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UNITED STATES

DEPARTMENT OF JUSTICE

IN RE: [REDACTED] AND [REDACTED], APPELLANTS,

VS. [REDACTED], AS JUSTICE OF THE

COURT OF APPEALS FOR THE [REDACTED]

IN THE [REDACTED] COURT OF APPEALS

FOR THE [REDACTED]

FILED [REDACTED]

RECORDED - NOVEMBER 17, 1960

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 378

ANONYMOUS NOS. 6 AND 7, APPELLANTS,

vs.

HON. GEORGE A. ARKWRIGHT, AS JUSTICE OF  
THE SUPREME COURT OF THE STATE OF  
NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

## INDEX

Original Print.

Proceedings in the Court of Appeals of New York  
Anonymous No. 6

Notice of motion to dismiss appeal .....	1	1
Affidavit of Denis M. Hurley in support of mo- tion to disniss appeal .....	2	2
Exhibit "A"—Order of the Appellate Division of the Supreme Court, Second Judicial De- partment, confirming determination .....	7	6
Exhibit "B"—Order of contempt of the Addi- tional Special Term of the Supreme Court of New York, County of Kings .....	9	7
Exhibit "C"—Order of commitment of the Additional Special Term of the Supreme Court of New York, County of Kings .....	14	11
Exhibit "D"—Notice of appeal to Court of Appeals from order of the Appellate Divi- sion of the Supreme Court of New York, Second Judicial Department .....	19	15



Notice of motion to dismiss appeal—Continued

Affidavit of Denis M. Hurley in support of motion to dismiss appeal—Continued

Original Print

Exhibit "E"—Order of Court of Appeals of New York to show cause why appeal should not be made, to permit filing of typewritten briefs, and for a stay

21 17

Exhibit "F"—Affidavit of Howard Bluestein in support of order to show cause

23 19

Exhibit "G"—Order of January 21, 1957 of Appellate Division of the Supreme Court of New York, Second Judicial Department, directing a judicial inquiry and investigation

33 27

Proceedings in the Court of Appeals of New York,

Anonymous No. 7

36 29

Notice of motion to dismiss appeal

36 29

Affidavit of Denis M. Hurley in support of motion to dismiss appeal

37 30

Exhibit "A"—Order of the Appellate Division of the Supreme Court of New York, Second Judicial Department, confirming determination

42 35

Exhibit "B"—Order of contempt of the Additional Special Term of the Supreme Court of New York, County of Kings

44 36

Exhibit "C"—Order of commitment of the Additional Special Term of the Supreme Court of New York, County of Kings

50 41

Exhibit "D"—Notice of appeal to Court of Appeals from order of the Appellate Division of the Supreme Court of New York, Second Judicial Department

56 45

Exhibit "E"—Order of the Court of Appeals of New York to show cause why appeal should not be made, to permit filing of typewritten briefs and for a stay

58 47

Exhibit "F"—Affidavit in support of order to show cause

60 49

Exhibit "G"—Order of January 21, 1957 of Appellate Division of the Supreme Court of New York, Second Judicial Department, directing a judicial inquiry and investigation

70 57

Notice of motion to dismiss appeal—Continued

Affidavit of Denis M. Hurley in support of motion to dismiss appeal—Continued

Original Print

Exhibit "H"—Stenographic minutes of proceedings had before the Additional Special Term of the Supreme Court of New York, County of Kings, of April 22 and 24, 1958 in Anonymous Cases Nos. 6 and 7 .....	73	59
Colloquy between Court and counsel .....	1	59
Testimony of Neal Percudani .....	12	66
Howard Bluestein .....	31	77
Colloquy between Court and counsel .....	41	84
Motion to produce minutes and denial thereof .....	44	86
Colloquy between Court and counsel .....	44	86
Testimony of Howard Bluestein .....	61	96
Colloquy between Court and counsel .....	66	99
Testimony of Neal Percudani .....	69	101
Colloquy between Court and counsel .....	78	106
Testimony of Anthony Zangara .....	82	109
Thomas J. Donlan .....	89	113
William A. Giustiniani .....	92	115
Howard Bluestein .....	94	116
Neal Percudani .....	100	120
Michael Santarsieri .....	104	122
Colloquy between Court and counsel; findings of contempt and sentences .....	110	125
Order to show cause of Supreme Court of New York, Appellate Division, Second Judicial Department, dated April 26, 1958 in Anonymous No. 6 .....	116	129
Petition filed in Supreme Court of New York, Appellate Division, Second Judicial Department, on April 25, 1958 .....	118	130
Exhibit "I" to Affidavit—Answer and return of Judge Arkwright .....	124	133
Opinion and decision slip of the Appellate Division, Second Judicial Department of May 25, 1958 .....	131	138
Order to show cause of Supreme Court of New York, Appellate Division, Second Judicial Department dated April 26, 1958 in Anonymous No. 7 .....	132	139

Notice of motion to dismiss appeal—Continued		
Affidavit of Denis M. Hurley in support of motion to dismiss appeal—Continued	Original	Print
Petition filed in Supreme Court of New York, Appellate Division, Second Judicial Department on April 25, 1958	134	140
Exhibit "I" to Affidavit—Answer and return of Judge Arkwright	140	143
Opinion and decision slip of the Appellate Division, Second Judicial Department of May 25, 1958	147	148
Affidavit of Howard Bluestein opposing motion to dismiss appeal in No. 6 Anonymous	148	149
Exhibit—Excerpts from summary report of the activities of the judicial inquiry	152	151
Affidavit of Neal Percudani opposing motion to dismiss appeal in No. 7 Anonymous	154	154
Exhibit—Excerpts from summary report of the activities of the judicial inquiry	158	156
Order dismissing appeal No. 6 Anonymous	160	159
Order dismissing appeal No. 7 Anonymous	161	160
Clerk's certificate No. 6 Anonymous	162	161
Clerk's certificate No. 7 Anonymous	163	162
Notice of appeal filed in the Court of Appeals of New York in No. 6 Anonymous	164	163
Notice of appeal filed in the Court of Appeals of New York in No. 7 Anonymous	168	166
Notice of appeal filed in the Appellate Division of the Supreme Court of New York, Second Judicial Department in No. 6 Anonymous	172	169
Notice of appeal filed in the Appellate Division of the Supreme Court of New York, Second Judicial Department in No. 7 Anonymous	175	172
Order postponing jurisdiction	178	174

[fol. 1]

**IN THE COURT OF APPEALS OF THE  
STATE OF NEW YORK**

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In the Matter of the Application of  
ANONYMOUS No. 6, Petitioner-Appellant,  
for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT, AS JUSTICE OF THE  
SUPREME COURT, Respondent-Respondent.

---

**NOTICE OF MOTION TO DISMISS APPEAL**

Sir:

Please Take Notice that on the annexed affidavit of Denis M. Hurley, verified June 18, 1958, and the exhibits thereto annexed, the respondent-respondent will move this Court at a Term thereof to be held at the Court of Appeals Hall in the City of Albany, New York, on June 24, 1958, at 2:00 P.M. of that day, or as soon thereafter as counsel can be heard, for an order dismissing the appeal taken as of right by the petitioner-appellant herein on the ground that the said appeal does not raise a substantial constitutional question and for such other relief as may be appropriate.

Dated: Brooklyn, New York, June 18, 1958.

Yours, etc.

Denis M. Hurley, Attorney for Respondent-Respondent, Room 301, Borough Hall, Brooklyn 1, New York.

To: Raphael H. Weissman, Esq., Attorney for Petitioner-Appellant, 189 Montague Street, Brooklyn, New York.

2  
[fol. 2]

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of  
ANONYMOUS No. 6, Petitioner-Appellant,  
for an order pursuant to Article 78 C-P A to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT, AS JUSTICE OF THE  
SUPREME COURT, Respondent-Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL

State of New York,  
City of New York,  
County of Kings, ss.:

Denis M. Hurley, being duly sworn deposes and says:

I am the attorney for respondent herein.

I make this affidavit in support of a motion to dismiss the appeal on the ground that there is no substantial constitutional question involved.

The appeal is from an order of the Appellate Division, Second Department, made and entered on May 26, 1958 (A copy of the May 26, 1958, order is attached hereto, made a part hereof and marked Exhibit "A").

Appellant was summarily held in criminal contempt of court and summarily committed to jail (Sections 750 (5) 751, Judiciary Law) pursuant to an order and commitment of the Additional Special Term of the Supreme Court, Kings County, both made and entered on April 24, 1958 (Copies of the Order and Commitment are attached hereto, made parts hereof and marked Exhibits "B" and "C" respectively).

By order to show cause made by Mr. Justice Charles E. Murphy of the Appellate Division, Second Department, [fol. 3] on April 26, 1958, appellant initiated in that court a proceeding under Article 78 of the Civil Practice Act to review the said contempt order and commitment made at



the Additional Special Term on April 24, 1958 (Section 752, Judiciary Law).

By the said order of May 26, 1958, the Appellate Division, Second Department confirmed the said contempt order and commitment made at the Additional Special Term.

Appellant's appeal is from the order of May 26, 1958, and his notice of appeal to this court is dated May 27, 1958 (A copy of the Notice of Appeal is attached hereto, made a part hereof and marked Exhibit "D").

By order to show cause made by Chief Judge Conway on June 10, 1958, appellant has brought on a motion in this court returnable June 24, 1958, at 2:00 P.M. for an order:

1. Allowing him to bring on his appeal on a typewritten record;
2. Allowing the briefs to be submitted in typewritten form; and
3. Staying the enforcement of the Appellate Division Order of May 26, 1958, and the Additional Special Term contempt order and commitment of April 24, 1958, pending the hearing and determination of the appeal herein (Copies of the Order to Show Cause and the Affidavit in Support thereof are attached hereto, made parts hereof and marked Exhibits "E" and "F" respectively).

The Appellate Division, Second Department, by an order dated January 21, 1957, directed a judicial inquiry and investigation into alleged unethical and unlawful practices of attorneys and others acting in concert with them in Kings County. The order of January 21, 1957, established the [fol. 4] said Additional Special Term at which the Judicial Inquiry is being conducted, and appointed Honorable George A. Arkwright, a Justice of the Supreme Court, to preside at that term. The order of January 21, 1957, directed that the Judicial Inquiry be conducted in private (A copy of the January 21, 1957, Order is attached hereto, made a part hereof and marked Exhibit "G").

The appellant is a licensed private detective and investigator. He conducts a private investigation business in partnership with another private detective and investigator under the trade name of Gotham Claims Bureau. He is not

a lawyer. He was held in contempt for refusing to answer questions propounded to him while he was being examined as a witness at the Additional Special Term. During this examination, his attorney, at the direction of the Justice presiding at the Additional Special Term, was absent from the courtroom. Appellant's sole ground for refusing to answer was that he was being deprived of the right to be represented by counsel while being examined. He maintained that this deprivation was violative of the due process clause of the Fourteenth Amendment to the United States Constitution. (Submitted herewith, made a part hereof and marked Exhibit "H" is a certified copy of the stenographic minutes of the official reporter, which contains a full and accurate account of what transpired with regard to the appellant at the Additional Special Term).

Counsel for Appellant, at the Additional Special Term, contended that appellant was entitled to the presence of counsel while he was being examined as a witness because appellant was a prospective defendant in a criminal case (Exhibit "H" at pp. 46, 50, 51 & 54\*). This was based on certain statements made by an attorney on the staff of the Judicial Inquiry, to appellant in the presence of his attorney. Some four and a half months prior to the time that appellant was called as a witness before the Additional [fol. 5] Special Term, the Judicial Inquiry attorney was approached by appellant and his attorney and was asked what was wanted of the appellant in the investigation. The Judicial Inquiry attorney described to appellant, in the presence of his attorney, the evidence the Judicial Inquiry had discovered regarding the activities of the appellant. The evidence was to the effect that someone in appellant's employ had obtained statements from defendants in negligence cases by falsely stating that he (Appellant's employee) represented the defendant's insurance company or the District Attorney's office; that once having secured the statements, they were tampered with. The Judicial Inquiry attorney then stated that it was his opinion that there was prima facie evidence, in the event that appellant pleaded the Fifth Amendment while being examined as a witness before the Additional Special Term, to refer

\* Printed herein at pages 87, 89, 90 and 92.

the matter to the District Attorney. The Judicial Inquiry attorney iterated and reiterated that this was only his opinion and that any final action in the matter would have to be taken by the Justice presiding at the Additional Special Term, and the Appellate Division, Second Department (Exhibit "H" at pp. 42, 92-94\*). The Justice presiding at the Additional Special Term ordered a hearing on the matter and after hearing all concerned, (Exhibit "H" at pp. 79-107\*\*) he decided that the statements made by the Judicial Inquiry attorney were nothing more than statements of opinion and fair warning to appellant and his attorney, that unless appellant testified truthfully he might find himself subject to charges. The Justice found further, that the statements made were proper and were made in the line of duty of an investigator and were not threats or or (sic) intimidation. (See paragraph Ninth, page 4† of Respondent's Answer and Return to appellant's petition initiating the Article 78 proceeding under the Civil Practice Act in the Appellate Division, Second Department. A copy of said Answer and Return is attached hereto, [fol. 6] made a part hereof and marked Exhibit "I").

The only question presented by this appeal is whether appellant, in the circumstances described, is entitled to the presence of counsel under the due process clause of the Fourteenth Amendment to the United States Constitution. Appellant has appealed to this Court as of right on the ground that the appeal involves a substantial constitutional question.

This Court has made a determination in a matter which is on all fours, factually, with the instant appeal, and respondent contends that that ruling of this Court is completely determinative of this motion (In the *Matter of M. Anonymous v. Arkwright*). In that matter a motion was made in this Court for leave to appeal which was denied on April 3, 1958 (Copies of the Affidavit and Brief in support of said motion for leave to appeal and of this Court's Order dated April 3, 1958, denying said motion are attached hereto, made parts hereof and marked Exhibits "J" "K" and "L" respectively).

\* Printed herein at pages 85, 115-116.

\*\* Printed herein at pages 107-124.

† Printed herein at page 135.

Wherefore, deponent respectfully prays that the motion be granted and the appeal dismissed.

                     /s/ Denis M. Hurley

[fol. 7]

**EXHIBIT "A" TO AFFIDAVIT**

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of May, 1958.

Present:

Hon. Gerald Nolan,

Presiding Justice,

" Henry G. Wenzel, Jr.,

" George J. Beldock,

" Henry L. Ughetta,

" James T. Hallinan,

Justices.

                      
In the Matter of the Application of

ANONYMOUS No. 6, Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act, to review and annul the determination and mandate of the HONORABLE GEORGE A. ARKWRIGHT, as Justice of the Supreme Court, Respondent.

                      
**ORDER CONFIRMING DETERMINATION**

The above named Anonymous No. 6, the petitioner in this proceeding having made an application, pursuant to Article 78 of the Civil Practice Act, to the Appellate Division of the Supreme Court in the Second Judicial Department, by petition sworn to the 25th day of April, 1958, to review and annul the determination and order of the Additional Special Term of the Supreme Court, Kings County, made and entered in the office of the Clerk of the County of Kings on April 24th, 1958, adjudging petitioner guilty of criminal contempt and ordering his imprisonment in jail in the



7

County of Kings for thirty days, and the said proceeding having come on for hearing before this court, by an order to show cause dated April 26th, 1958.

Now on reading and filing the order to show cause, dated April 26th, 1958, the petition sworn to April 25th, 1958, petitioner's brief, the answer and return of respondent, the minutes of April 22, 1958, the order of April 24th, 1958, and all the papers filed herein, and Mr. Raphael H. Weiss-[fol. 8] man appearing for petitioner, and Mr. Denis M. Hurley appearing for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the determination of respondent be and the same hereby is unanimously confirmed, without costs.

Enter:

JOHN J. CALLAHAN  
Clerk.

[fol. 9]

EXHIBIT "B" TO AFFIDAVIT

At an Additional Special Term of the Supreme Court held in and for the County of Kings at the Borough Hall in Brooklyn, Kings County, New York, on the 24 day of April, 1958, pursuant to a certain order of the Appellate Division made and entered on the 21st day of January, 1957

Present

Honorable GEORGE A. ARKWRIGHT

Justice

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings.



The Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on January 21, 1957, having made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and pursuant to said order, as amended, said Appellate Division having directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and pursuant to said order, as amended, the said Appellate Division having appointed an Additional Special Term of the Supreme Court in and [fol. 10] for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and pursuant to said order, as amended, said Appellate Division having assigned the said Justice to hold said Additional Special Term; and pursuant to said order, as amended, said Appellate Division having designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And the said Court and said Justice having on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day, pending before it and him the said Judicial Inquiry and Investigation, one Howard Bluestein was then and there in open court duly called as a witness by Denis M. Hurley, Esq., pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Howard Bluestein; and the said Howard Bluestein, after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein was then and there duly ordered by said

Court and Justice to answer the following legal and proper interrogatories:

1. "In the Gotham Claims Bureau is your partner Neal Perducani?"

2. "Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the County Clerk's office?"

3. "Are you and Mr. Percudani the only partners in that firm?"

[fol. 11] 4. "Is your place of business at 16 Court Street, Brooklyn?"

5. "How many employees do you have in your business?"

6. "Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?"

7. "Does your firm Gotham Claims Bureau do work for attorneys?"

8. "Does your company do work for an attorney named I. Frank Miller?"

9. "Has your firm done work for an attorney named David Goldner?"

10. "Have you or your firm done work for Mr. Zangara?"

11. "Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?"

12. "Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?"

13. "Have you referred any cases to a lawyer named I. Frank Miller?"

14. "Have you referred any cases to a lawyer named David Goldner?"

15. "Will you name the attorneys to whom you have referred cases, negligence cases?"

16. "Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?"

and thereupon the said Howard Bluestein did in the immediate view and presence of said Court and Justice, contumaciously, unlawfully and without reasonable or just cause refuse and continue to refuse to answer the above [fol. 12] listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by the said Appellate Division and the due and orderly administration of justice;

And the said Court and Justice having ordered that said Howard Bluestein reappear before said Court and Justice on April 24, 1958;

And the said Howard Bluestein, having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Howard Bluestein having been again asked, in verbatim, the above listed legal and proper interrogatories and having then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And the said Howard Bluestein did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

WHEREUPON AND WHEREFORE, it is hereby ordered and adjudged that the said Howard Bluestein still duly sworn

as a witness and now present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories, as aforesaid, is guilty of a criminal [fol. 13] contempt (Sections 750 (5), 751, Judiciary Law), by reason of the aforesaid contumacious, unlawful and unreasonable conduct and it is further hereby ordered and adjudged that said Howard Bluestein be imprisoned and held in close custody in jail in the County of Kings for thirty (30) days; and it is further hereby ordered and adjudged that this order be sealed and impounded and the County Clerk is hereby directed to prohibit access to this order without further order of this Court.

Let a commitment issue accordingly.

**ENTER**

**GEORGE A. ARKWRIGHT**  
Justice, Supreme Court of the  
State of New York

[fol. 14]

**EXHIBIT "C" TO AFFIDAVIT**

**THE PEOPLE OF THE STATE OF NEW YORK**

To the Sheriff of the City of New York, Kings County Division

**GREETING:**

**WHEREAS** the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, on January 21, 1957, made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and whereas, pursuant to said order, as amended, the said Appellate Division directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony



under oath and the production of all relevant books, papers and records; and whereas pursuant to said order, as amended, the said Appellate Division appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and whereas, pursuant to said order, as amended, said Appellate Division assigned the said Justice to hold said Additional Special Term; and whereas, pursuant to said order, as amended, said Appellate Division designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

[fol. 15] And whereas said Court and said Justice on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day had pending before it and him the said Judicial Inquiry and Investigation; and whereas one Howard Bluestein was then and there in open court duly called as a witness by Denis M. Hurley, Esq., counsel in said Judicial Inquiry and Investigation, pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Howard Bluestein; and whereas the said Howard Bluestein after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein, was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:

1. "In the Gotham Claims Bureau is your partner Neal Perducani?"

2. "Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the County Clerk's office?"

3. "Are you and Mr. Percudani the only partners in that firm?"

4. "Is your place of business at 16 Court Street, Brooklyn?"



5. "How many employees do you have in your business?"

6. "Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?"

7. "Does your firm Gotham Claims Bureau do work for attorneys?"

8. "Does your company do work for an attorney named I. Frank Miller?"

[fol. 16] 9. "Has your firm done work for an attorney named David Goldner?"

10. "Have you or your firm done work for Mr. Zangara?"

11. "Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?"

12. "Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?"

13. "Have you referred any cases to a lawyer named I. Frank Miller?"

14. "Have you referred any cases to a lawyer named David Goldner?"

15. "Will you name the attorneys to whom you have referred cases, negligence cases?"

16. "Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?"

and whereas therefore the said Howard Bluestein did in the immediate view and presence of said Court and Justice contumaciously, unlawfully and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and whereas said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investiga-

tion, ordered as aforesaid by the said Appellate Division, and the due and orderly administration of justice;

And whereas the said Court and Justice having ordered that said Howard Bluestein reappear before said Court and Justice on April 24, 1958;

And whereas the said Howard Bluestein, having re-[fol. 17] appeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Howard Bluestein having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And whereas the said Howard Bluestein did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

And whereas it was thereupon and therefore ordered and adjudged on April 24, 1958, by said Court and Justice that the said Howard Bluestein then present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories was and is guilty of a criminal contempt (Sections 750(5), 751, Judiciary Law) by reason of the aforesaid contumacious, unlawful and unreasonable conduct in said Judicial Inquiry and Investigation; and whereas it was then further ordered and adjudged by said Court and Justice on April 24, 1958, that the said Howard Bluestein be imprisoned and held in close custody in jail in the County of Kings, for thirty (30) days;

Now, THEREFORE, we command you that you take the body of the said Howard Bluestein and safely keep him in your close custody in jail in the County of Kings for thirty

[fol. 18] (30) days; and you are to return this writ and to make and return to said Supreme Court in Kings County a certificate under your hand of the manner in which you have executed the same; and we further command you that you seal and impound this writ and you are to prohibit access to this writ without further command from this Court.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of the Supreme Court, at the Borough Hall in the Borough of Brooklyn, County of Kings, City and State of New York, this 24 day of April, 1958.

By the Court      JOSEPH B. WHITTY  
Clerk

GEORGE A. ARKWRIGHT  
J. S. C.

[fol. 19]

EXHIBIT "D" TO AFFIDAVIT

SUPREME COURT  
OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT  
AND KINGS COUNTY

Kings County File No. 12256-1957

In the Matter of the Application of  
ANONYMOUS No. 6

Petitioner,  
for an order pursuant to Article 78 C P A to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioner hereby appeals to the Court of Appeals of the State of New York from an

order dated and filed in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, Second Department, on the 26th day of May, 1958, confirming the determination and mandate made at the Additional Special Term (Judicial Inquiry) and entered in the office of the Clerk of Kings County on April 24, 1958, adjudging petitioner guilty of a criminal contempt of court.

PLEASE TAKE FURTHER NOTICE that this appeal is taken as of right on the ground that there is directly involved the construction of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Dated, Brooklyn, New York,  
May 27, 1958.

RAPHAEL H. WEISSMAN,  
Attorney for Petitioner  
(Howard Bluestein)  
Office & P. O. Address,  
185 Montague Street,  
Brooklyn 1, New York

[fol. 20] To:

DENIS M. HURLEY, Esq.  
Attorney for Respondent  
Room 301  
Borough Hall  
Brooklyn 1, New York.

HON. JOHN J. CALLAHAN  
Clerk of the Appellate Division,  
Second Department

HON. JOSEPH B. WHITTY  
Clerk of the County of Kings.

[fol. 21]

**EXHIBIT "E" TO AFFIDAVIT**

**COURT OF APPEALS  
OF THE STATE OF NEW YORK**

**In the Matter of the Application of  
ANONYMOUS No. 6**

**Petitioner-Appellant,**  
for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of the

**HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,**

**Respondent-Respondent.**

**ORDER TO SHOW CAUSE**

Upon (1) the affidavit of petitioner (Howard Bluestein), sworn to May 29, 1958; (2) a copy of the notice of appeal to the Court of Appeals, dated May 27, 1958; (3) a copy of the undertaking dated May 27, 1958, to perfect the appeal; (4) a copy of the surety bond filed in the office of the Clerk of the Appellate Division, Second Department, and (5) a copy of the decision of the Appellate Division, Second Department, dated May 26, 1958,

LET the respondent or his counsel show cause on the 24th day of June, 1958, at 2 o'clock in the afternoon at the Court of Appeals Hall, Albany, New York,

WHY an order should not be made herein:

- (a) allowing the appeal in this Court to be heard upon certified copies of the notice of appeal and of the Appellate Division decision and order on appeal, dated May 26, 1958, and the original record on file in the office of the Clerk of the Appellate Division, Second Department, consisting of the order to show cause dated April 26, 1958, made by Mr. Justice



Murphy, the petition, verified April 25, 1958, the commitment dated April 24, 1958, thereto attached as an exhibit, the answer and return, verified the [fol. 22] 29th day of April, 1958, certified copies of the order and mandate each dated April 24, 1958, thereto attached, together with the stenographic record of the testimony and directing the return of said original record by the Clerk of the Appellate Division, Second Department, to this Court for such purpose and dispensing with the printing, serving and filing of any other copies thereof; and

- (b) allowing the filing by each side of seven typewritten copies of the brief and serving of one copy and dispensing with the printing, serving and filing of any other copies thereof; and
- (c) staying the enforcement of the order of the Appellate Division and of the determination and order of the respondent herein pending the hearing and determination of the appeal herein.

Sufficient cause appearing therefor, IT IS ORDERED that, in the meantime, and pending the hearing and determination by this Court of petitioner's application for a stay as aforesaid, the enforcement of the order of the Appellate Division and of the determination and order of the respondent herein be and it hereby is stayed, pursuant to Section 598-a of the Civil Practice Act, upon condition that petitioner file a surety bond, in the nature of a bail bond, in the sum of \$2,500.00.

Sufficient cause appearing therefor, LET service of a copy of this order to show cause and the papers upon which it is based upon the respondent's attorney on or before the 13th day of June, 1958, at 2 o'clock be deemed sufficient service hereof.

Dated, Brooklyn, New York  
June 10, 1958

(Signed) Albert Conway  
Chief Judge of the Court of Appeals  
of the State of New York

[fol. 23]

## EXHIBIT "F" TO AFFIDAVIT

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of

~~ANONYMOUS~~ No. 6

Petitioner-Appellant,

for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of theHONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent-Respondent.

## AFFIDAVIT

STATE OF NEW YORK,  
COUNTY OF KINGS, ss.:

HOWARD BLUESTEIN, being duly sworn, says:

I am the appellant herein. I make this affidavit in support of the relief sought by the attached order to show cause.

This is an appeal from an order dated May 26, 1958, of the Appellate Division, Second Department, unanimously affirming a mandate under which appellant was lodged in City Prison on April 24, 1958. A correct copy of the decision of said Appellate Division is hereto attached.

The mandate was made by Mr. Justice Arkwright at the Additional Special Term, Kings County (Judicial Inquiry) on April 24, 1958, as punishment for alleged criminal contempt, citing "Section 750(5), 751, Judiciary Law."

"Such" mandates "are reviewable by a proceeding under article seventy-eight of the civil practice act" (Section 752, Judiciary Law).

[fol. 24] The Appellate Division order on appeal is a final order in such proceeding.

Correct copies of my notice of appeal to this Court and the undertaking to perfect it are hereto attached. The notice of appeal and undertaking were served upon the attorney for the respondent and filed in the office of the Clerk of the Appellate Division, Second Department and in the office of the Clerk of Kings County.

I was sentenced to prison for 30 days.

After serving two days I was released on a \$2500 bond filed in the office of the Clerk of the Appellate Division, Second Department, by order to show cause made by Mr. Justice Murphy of said Appellate Division on April 26, 1958. A correct copy of said bond is hereto attached.

The mandate recites that I was duly sworn as a witness, ordered to answer specified questions and that I refused to do so in the immediate view and presence of the Court.

It is admitted by respondent's answer that I requested representation by counsel in court during the questioning and that I refused to answer only after my request was denied by Mr. Justice Arkwright.

It was made clear to Mr. Justice Arkwright that my claim to the right to have my counsel present during the questioning was under the due process clause of the Fourteenth Amendment of the United States Constitution.

Thus the question on this appeal is whether the exclusion of my counsel during the questioning was a denial to me of such due process in the special facts of this case. [fol. 25] Hence this appeal lies as of right under Section 588, subdivision 1 (a), Civil Practice Act, on the constitutional ground.

I am not an attorney at law.

I am a licensed private detective and investigator. I am a partner in such business conducted under a trade name.

I repeatedly protested to Mr. Justice Arkwright that I was being questioned as a person accused of a crime and not as a mere witness, and that the accusation had been made by a member of the staff of the Judicial Inquiry.

Mr. Justice Arkwright held a hearing on this. Here is the text of the admissions by the staff member in question (which is found at pages 92-94\* of the stenographic transcript, except that underscoring is supplied):

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\* Printed herein at pages 115-116.

"BY THE COURT:

Q. You heard what was said. Do you wish to say anything?

A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the ~~outer~~ foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from defendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to them to find [fol. 26] out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even



being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done."

The public press shows that reference by the Judicial Inquiry to the District Attorney was no idle threat. It was reported in the Brooklyn Section of the Third Edition of the New York World-Telegram, April 30, 1958, that

"The court investigators have been sending evidence to the district attorney's office since the first of this year.

A special rackets grand jury was impaneled March 3 to investigate criminal activity on the part of Brooklyn attorneys and last week returned its first indictment, \* \* \*."

[fol. 27] In the special circumstances of this case, the denial of representation by counsel during questioning was a denial of due process of law. I was being questioned as a person already accused of crime. In the language of the staff member quoted above—against me—the "investigation had disclosed \* \* \* there was prima facie evidence \* \* \* to refer this matter to the district attorney."

True, I could invoke the privilege against self-incrimination. But I am not a lawyer. I needed the guiding hand of counsel to be present and to advise me as to my right to do so during the course of the questioning.

My appeal presents a substantial due process question. I am advised by counsel and I verily believe that my case is not within the decisions heretofore made by the Appellate Division in the cases of M & S Anonymous, because

of the special facts presented by my case. Even so, neither this Court nor the United States Supreme Court has as yet passed upon the question. This Court, I am advised, merely denied leave to appeal in *M. Anonymous* where questions other than the constitutional question were also sought to be reviewed. There was no attempt there to review the constitutional question alone.

I am advised by counsel that *Matter of Groban* (252 U.S. 530), which is cited in *M. Anonymous*, supports my claim in the exceptional circumstances of my case for the following reasons, as I am advised and believe: That was a five-to-four decision. There were, however, three opinions: a majority opinion by three against the claim of representation [fol. 28] on the facts of that case; a concurring opinion by two; and a solid dissenting opinion by four in support of the constitutional claim of representation even on the facts of that case. All opinions support the constitutional claim to representation by counsel during questioning in the instant exceptional circumstances.

The majority opinion states (352 U.S. 333):

"The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts in support of such a belief, does not bar the taking of testimony in a private investigatory proceeding."

Here the case went far beyond mere suspicion. Here there were admitted facts to show that my belief was justified. Here there was an actual threat to send a prima facie case of crime against me to the District Attorney.

The concurring opinion there states (352 U.S. 336):

"This is not a statute directed to the examination of suspects."

Here I was not only suspect. I had already been accused of crime and a prima facie case against me was ready to be referred to the District Attorney.

The concurring opinion in *Groban* further states (352 U.S. 337):

"What has been said disposes of the suggestion that, because this statute relating to a general administra-

tive, non-prosecutorial inquiry into the causes of fire is sustained; it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained."

[fol. 29] Here is no "administrative" inquiry in the sense of that quotation. Here is a judicial inquiry. This is not a problem of semantics. The mere fact that both administrative and judicial departments of government make inquiries does not identify them in the face of due process. A court in any aspect of its function is the last place in the whole world where full due process should be denied.

It is absurd to identify the reality of the power here exercised with that in *Groban*. There is here no such attendant urgency as that involved in investigating the cause of a fire. The exclamation—"What's your hurry, where's the fire?"—is in the very warp and woof of our language. This inquiry is designed to be conducted by a Justice of the Supreme Court in the calm atmosphere and with all the paraphernalia of a courtroom, including a large staff of counsel on one side.

If this were not the exercise of a judicial power there would be no foundation for the exercise of the power to punish for contempt. For here the mandates were made in the exercise of the power of a "court" (Section 750, Judiciary Law).

And here the "secret inquisitorial powers" are in effect exercised for purposes of the "District Attorney." It already appears that the public press announced that "The Court investigators have been sending evidence to the district attorney's office since the first of the year."

The concurring opinion in *Groban* further states (352 U.S. at p. 337):

[fol. 30] "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Here, let it not be forgotten that I had already been accused of a prima facie case of crime which was ready to be referred to the District Attorney.

The position in which a person called to testify finds himself in does not depend upon how the judge describes it, whether "witness" or accused. It depends upon the facts. It does not dissipate a person's peril as an accused if the judge tells him he is a witness, as was done here by Mr. Justice Arkwright. The justice had no power to grant him immunity from the prima facie case that was ready to be sent to the District Attorney.

In the answer herein Mr. Justice Arkwright wrote:

"While respondent recognizes that the claims of some witnesses to the desirability of having counsel present may be stronger in some cases than in others (because, for example, they may themselves later possibly become implicated in wrong doing), any relaxation . . . " etc.

Before a person is himself "implicated" there is still room for exercise of discretion depending upon proximity to such implication.

Once, however, as in the instant proceedings, the persons have already been implicated there is no longer room for the exercise of discretion. A denial of the claimed representation after implication is a denial of due process.

[fol. 31] Continuing the last quotation made from the answer of Mr. Justice Arkwright in these proceedings:

"any relaxation of the rule as to counsel would not only result in different treatment for different witnesses, but would soon jeopardize all privacy of the proceedings before the Judicial Inquiry."

A "different treatment" for different objective situations, as in the case of petitioner, is of the very essence of due process. It is only "different treatment" for the same objective situations that is abhorrent to equality before the law. Equally abhorrent is the same treatment for different objective situations.

As to the privacy of the Judicial Inquiry: Exceptional circumstances such as those at bar will be only few. The lawyers then allowed to be present can surely be depended upon to maintain the necessary privacy. Lawyers have for centuries been entrusted with confidential communica-



tions involving the very lives of others. They have not been found wanting. It would be lamentable if the Judicial Inquiry had to be conducted on the predicate that the Bar could not in exceptional circumstances be trusted to maintain the necessary privacy.

Denial of the claimed rights of representation by counsel was in the exceptional circumstances herein a denial of due process.

The stay requested should be granted. Otherwise my right to appeal would be frustrated. For I will have been imprisoned the full 30 days until my appeal can be finally decided. On the application for the stay before Mr. Justice [fol.32] Murphy, counsel for respondent candidly admitted that a stay pending appeal would not impede the Judicial Inquiry. The same is true now.

There is no need for any further bond in connection with the stay. The bond already on file fully protects the interests of the Judicial Inquiry.

The relief with respect to the record on appeal and the briefs should be granted in order to protect the privacy of the inquiry. If printing is required there can be no assurance of that. If the appeal is heard as requested, the privacy can easily be protected.

I am a citizen of the United States. My business office is in Brooklyn, New York. I am married and live with my wife and infant child at 5413 Kings Highway, Brooklyn, New York.

An order to show cause is necessary because there is need for the stay.

No previous application has been made for this or similar relief.

Wherefore deponent prays for the relief in the order to show cause.

/s/ Howard Bluestein

Sworn to before me this  
29th day of May, 1958.

/s/ Gertrude E. Maguire  
Notary Public, State of New York  
Qualified in Queens County  
No. 41-7665300  
Commission Expires March 30, 1960

EXHIBIT "G" TO AFFIDAVIT

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present:

HON. GERALD NOLAN,

Presiding Justice,

" HENRY G. WENZEL, JR.,

" GEORGE J. BELDOCK,

" CHARLES E. MURPHY,

" HENRY L. UGHETTA,

Associate Justices.

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice, by Attorneys and Counselors-at-Law and by Others Acting in Concert with Them in the County of Kings.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

Now, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made;

(1) With respect to the alleged improper practices and [fol. 34] abuses by attorneys and counselors-at-law in Kings

County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, AN ADDITIONAL SPECIAL TERM OF THE SUPREME COURT, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice GEORGE A. ARKWRIGHT, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that DENIS M. HURLEY, Esq., an attorney and [fol. 35] counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the

facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

ENTER:

GERALD NOLAN,  
Presiding Justice.

[fol. 36]

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of

ANONYMOUS No. 7,

Petitioner-Appellant,

for an order pursuant to Article 78 C P A to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent-Respondent.

NOTICE OF MOTION TO DISMISS APPEAL

SIR:

PLEASE TAKE NOTICE that on the annexed affidavit of DENIS M. HURLEY, verified June 18, 1958, and the exhibits thereto annexed, the respondent-respondent will move this Court at a Term thereof to be held at the Court of Appeals Hall in the City of Albany, New York, on June 24, 1958, at 2:00 P.M. of that day, or as soon thereafter as counsel can be heard, for an order dismissing the appeal taken as of



right by the petitioner-appellant herein on the ground that the said appeal does not raise a substantial constitutional question and for such other relief as may be appropriate.

Dated: Brooklyn, New York  
June 18, 1958

Yours, etc.

DENIS M. HURLEY,  
Attorney for Respondent-Respondent  
Room 301, Borough Hall  
Brooklyn 1, New York

To:

RAPHAEL H. WEISSMAN, Esq.,  
Attorney for Petitioner-Appellant  
189 Montague Street  
Brooklyn, New York.

[fol. 37]

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of  
ANONYMOUS No. 7,

Petitioner-Appellant,

for an order pursuant to Article 78 C P A to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent-Respondent.

AFFIDAVIT OF DENIS M. HURLEY IN SUPPORT OF MOTION  
TO DISMISS APPEAL

State of New York,  
City of New York,  
County of Kings, ss.:

DENIS M. HURLEY, being duly sworn deposes and says:

I am the attorney for respondent herein.

I make this affidavit in support of a motion to dismiss the appeal on the ground that there is no substantial constitutional question involved.

The appeal is from an order of the Appellate Division, Second Department, made and entered on May 26, 1958 (A copy of the May 26, 1958, order is attached hereto, made a part hereof and marked Exhibit "A").

Appellant was summarily held in criminal contempt of court and summarily committed to jail (Sections 750 (5), 751, Judiciary Law) pursuant to an order and commitment of the Additional Special Term of the Supreme Court, Kings County, both made and entered on April 24, 1958 (Copies of the Order and Commitment are attached hereto, made parts hereof and marked Exhibits "B" and "C" respectively).

By order to show cause made by Mr. Justice Charles E. Murphy of the Appellate Division, Second Department, on [fol. 38] April 26, 1958, appellant initiated in that court a proceeding under Article 78 of the Civil Practice Act to review the said contempt order and commitment made at the Additional Special Term on April 24, 1958 (Section 752, Judiciary Law).

By the said order of May 26, 1958, the Appellate Division, Second Department confirmed the said contempt order and commitment made at the Additional Special Term.

Appellant's appeal is from the order of May 26, 1958, and his notice of appeal to this court is dated May 27, 1958 (A copy of the Notice of Appeal is attached hereto, made a part hereof and marked Exhibit "D").

By order to show cause made by Chief Judge Conway on June 10, 1958, appellant has brought on a motion in this court returnable June 24, 1958, at 2:00 P.M. for an order:

1. Allowing him to bring on his appeal on a typewritten record;
2. Allowing the briefs to be submitted in typewritten form; and
3. Staying the enforcement of the Appellate Division Order of May 26, 1958, and the Additional Special Term contempt order and commitment of April 24,

1958, pending the hearing and determination of the appeal herein (Copies of the Order to Show Cause and the Affidavit in Support thereof are attached hereto, made parts hereof and marked Exhibits "E" and "F" respectively).

The Appellate Division, Second Department, by an order dated January 21, 1957, directed a judicial inquiry and investigation into alleged unethical and unlawful practices of attorneys and others acting in concert with them in Kings County. The order of January 21, 1957, established the said [fol. 39] Additional Special Term at which the Judicial Inquiry is being conducted, and appointed Honorable George A. Arkwright, a Justice of the Supreme Court, to preside at that term. The order of January 21, 1957, directed that the Judicial Inquiry be conducted in private (A copy of the January 21, 1957, Order is attached hereto, made a part hereof and marked Exhibit "G").

The appellant is a licensed private detective and investigator. He conducts a private investigation business in partnership with another private detective and investigator under the trade name of Gotham Claims Bureau. He is not a lawyer. He was held in contempt for refusing to answer questions propounded to him while he was being examined as a witness at the Additional Special Term. During this examination, his attorney, at the direction of the Justice presiding at the Additional Special Term, was absent from the courtroom. Appellant's sole ground for refusing to answer was that he was being deprived of the right to be represented by counsel while being examined. He maintained that this deprivation was violative of the due process clause of the Fourteenth Amendment to the United States Constitution. (Submitted herewith, made a part hereof and marked Exhibit "H" is a certified copy of the stenographic minutes of the official reporter, which contains a full and accurate account of what transpired with regard to the appellant at the Additional Special Term).

Counsel for Appellant, at the Additional Special Term, contended that appellant was entitled to the presence of counsel while he was being examined as a witness because appellant was a prospective defendant in a criminal case

(Exhibit "H" at pp. 46, 50, 51 & 54\*). This was based on certain statements made by an attorney on the staff of the Judicial Inquiry, to appellant in the presence of his attorney. Some four and a half months prior to the time that appellant was called as a witness before the Additional [fol. 40] Special Term, the Judicial Inquiry attorney was approached by appellant and his attorney and was asked what was wanted of the appellant in the investigation. The Judicial Inquiry attorney described to appellant, in the presence of his attorney, the evidence the Judicial Inquiry had discovered regarding the activities of the appellant. The evidence was to the effect that someone in appellant's employ had obtained statements from defendants in negligence cases by falsely stating that he (Appellant's employee) represented the defendant's insurance company or the District Attorney's office; that once having secured the statements, they were tampered with. The Judicial Inquiry attorney then stated that it was his opinion that there was prima facie evidence, in the event that appellant pleaded the Fifth Amendment while being examined as a witness before the Additional Special Term, to refer the matter to the District Attorney. The Judicial Inquiry attorney iterated and reiterated that this was only his opinion and that any final action in the matter would have to be taken by the Justice presiding at the Additional Special Term, and the Appellate Division, Second Department (Exhibit "H" at pp. 42, 92-94\*\*). The Justice presiding at the Additional Special Term ordered a hearing on the matter and after hearing all concerned, (Exhibit "H" at pp. 79-107†) he decided that the statements made by the Judicial Inquiry attorney were nothing more than statements of opinion and fair warning to appellant and his attorney, that unless appellant testified truthfully he might find himself subject to charges. The Justice found further, that the statements made were proper and were made in the line of duty of an investigator and were not threats or or (sic) intimidation.

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\* Printed herein at pages 87, 89, 90 and 92.

\*\* Printed herein at pages 85, 115-116.

† Printed herein at pages 107-124.



(See paragraph Ninth, page 4\* of Respondent's Answer and Return to appellant's petition initiating the Article 78 proceeding under the Civil Practice Act in the Appellate Division, Second Department. A copy of said Answer and [fol. 41] Return is attached hereto, made a part hereof and marked Exhibit "I").

The only question presented by this appeal is whether appellant, in the circumstances described, is entitled to the presence of counsel under the due process clause of the Fourteenth Amendment to the United States Constitution. Appellant has appealed to this Court as of right on the ground that the appeal involves a substantial constitutional question.

This Court has made a determination in a matter which is on all fours, factually, with the instant appeal, and respondent contends that that ruling of this Court is completely determinative of this motion (In the *Matter of M. Anonymous v. Arkwright*). In that matter a motion was made in this Court for leave to appeal which was denied on April 3, 1958 (Copies of the Affidavit and Brief in support of said motion for leave to appeal and of this Court's Order dated April 3, 1958, denying said motion are attached hereto, made parts hereof and marked Exhibits "J" "K" and "L" respectively).

Wherefore, deponent respectfully prays that the motion be granted and the appeal dismissed.

/s/ Denis M. Hurley

[fol. 42]

## EXHIBIT "A" TO AFFIDAVIT

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of May, 1958.

Present:

HON. GERALD NOLAN,

Presiding Justice,

" HENRY G. WENZEL, JR.,

" GEORGE J. BELDOCK,

" JAMES T. HALLINAN,

" HENRY L. UGHETTA,

Justices.

In the Matter of the Application of  
ANONYMOUS No. 7,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act, to review and annul the determination and mandate of the Honorable GEORGE A. ARKWRIGHT, as Justice of the Supreme Court,

Respondent.

## ORDER CONFIRMING DETERMINATION

The above named Anonymous No. 7, the petitioner in this proceeding having made an application, pursuant to Article 78 of the Civil Practice Act, to the Appellate Division of the Supreme Court in the Second Judicial Department, By petition sworn to the 25th day of April, 1958, to review and annul the determination and order of the Additional Special Term of the Supreme Court, Kings County, made and entered in the office of the Clerk of the County of Kings on April 24th, 1958, adjudging petitioner guilty of criminal contempt and ordering his imprisonment in jail in the County of Kings for thirty days, and the said proceeding

having come on for hearing before this court, by an order to show cause, dated April 26th, 1958.

Now on reading and filing the order to show cause, dated April 26th, 1958, the petition sworn to April 25th, 1958, petitioner's brief, the answer and return of respondent, the minutes of April 22, 1958, the order of April 24th, 1958, and [fol. 43] all the papers filed herein, and Mr. Raphael H. Weissman appearing for petitioner, and Mr. Denis M. Hurley appearing for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the determination of respondent be and the same hereby is unanimously confirmed, without costs.

Enter:

JOHN J. CALLAHAN

Clerk.

[fol. 44]

EXHIBIT "B" TO AFFIDAVIT

At an Additional Special Term of the Supreme Court held in and for the County of Kings at the Borough Hall in Brooklyn, Kings County, New York, on the 24 day of April, 1958, pursuant to a certain order of the Appellate Division made and entered on the 21st day of January, 1957.

Present

HONORABLE GEORGE A. ARKWRIGHT,

Justice.

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice, by Attorneys and Counselors-at-Law and by Others Acting in Concert with Them, in the County of Kings.

The Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on January 21, 1957, having made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and pursuant to said order, as amended, said Appellate Division having directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and pursuant to said order, as amended, the said Appellate Division having appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be [fol. 45] held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and pursuant to said order, as amended, said Appellate Division having assigned the said Justice to hold said Additional Special Term; and pursuant to said order, as amended, said Appellate Division having designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And the said Court and said Justice having on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day, pending before it and him the said Judicial Inquiry and Investigation, one Neal Percudani was then and there in open court duly called as a witness by Denis M. Hurley, Esq., pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Neal Percudani; and the said Neal Percudani, after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:



1. "Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau located in Brooklyn, New York?"

2. "Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—"

3. "In connection with Gotham Claims Bureau, Mr. Percudani, would you tell this Court what attorneys you do investigating work for?"

[fol. 46] 4. "How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you or Mr. Bluestein?"

5. "Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?"

6. "Mr. Percudani, did you work in connection with your business, the Gotham Claims Bureau, for an attorney named I. Frank Miller at any time?"

7. "Mr. Percudani, did you in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?"

8. "Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?"

9. "Mr. Percudani, how old are you, sir?"

10. "Where do you live now, Mr. Percudani?"

11. "Mr. Percudani, were you born in 1903?"

12. "Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?"

13. "Are you married, Mr. Percudani?"

14. "Let me ask you this: Is the Gotham Claims Agency a trade name?"

15. "And are you and Mr. Bluestein the only partners in that concern?"

16. "Are your offices at 16 Court Street, Brooklyn, New York, sir?"

17. "Is the principal work of Gotham Claims Bureau investigating cases for attorneys?"

[fol. 47] 18. "Have you personally, Mr. Percudani, referred any cases to attorneys?"

19. "Have you done any investigating work for an attorney named David Goldner?"

20. "Have you referred a number of cases to Mr. Goldner?"

21. "Have you produced today, Mr. Percudani, your financial records?"

22. "Have you produced your records, reports, statements, bills pertaining to any and all investigations of business of any nature for or concerning I. Frank Miller, attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?"

23. "Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?"

24. "Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?"

and thereupon the said Neal Percudani did in the immediate view and presence of said Court and Justice, contumaciously, unlawfully and without reasonable or just cause refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by the said Appellate Division and the due and orderly administration of justice;

[fol. 48] And the said Court and Justice having ordered that said Neal Percudani reappear before said Court and Justice on April 24, 1958;

And the said Neal Percudani having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Neal Percudani having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And the said Neal Percudani did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

WHEREUPON AND WHEREFORE, it is hereby ordered and adjudged that the said Neal Percudani still duly sworn as a witness and now present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories, as aforesaid, is guilty of a criminal contempt (Sections 750 (5), 751, Judiciary Law), by reason of the aforesaid contumacious, unlawful and unreasonable conduct and it is further hereby ordered and adjudged that said Neal Percudani be imprisoned and held in close custody in jail in the County of Kings for thirty (30) days; and it is [fol. 49] further hereby ordered and adjudged that this order be sealed and impounded and the County Clerk is hereby directed to prohibit access to this order without further order of this Court.

Let a commitment issue accordingly.

ENTER

GEORGE A. ARKWRIGHT  
Justice, Supreme Court of the  
State of New York

[fol. 50]

## EXHIBIT "C" TO AFFIDAVIT

THE PEOPLE OF THE STATE OF NEW YORK

To the Sheriff of the City of New York, Kings County  
Division,

GREETING:

WHEREAS the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, on January 21, 1957, made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and whereas, pursuant to said order, as amended, the said Appellate Division directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and whereas pursuant to said order, as amended, the said Appellate Division appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and whereas, pursuant to said order, as amended, said Appellate Division assigned the said Justice to hold said Additional Special Term; and whereas, pursuant to said order, as amended, said Appellate Division designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

[fol. 51] And whereas said Court and said Justice on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day had pending before it and him the said Judicial Inquiry and Investigation; and whereas one



Neal Percudani was then and there in open court duly called as a witness by Denis M. Hurley, Esq., counsel in said Judicial Inquiry and Investigation, pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Neal Percudani; and whereas the said Neal Percudani after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein, was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:

1. "Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau located in Brooklyn, New York?"

2. "Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—"

3. "In connection with Gotham Claims Bureau, Mr. Percudani, would you tell this Court what attorneys you do investigating work for?"

4. "How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you or Mr. Bluestein?"

5. "Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?"

6. "Mr. Percudani, did you work in connection with your business, the Gotham Claims Bureau, for an attorney named I. Frank Miller at any time?"

[fol. 52] 7. "Mr. Percudani, did you in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?"

8. "Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?"

9. "Mr. Percudani, how old are you, sir?"

10. "Where do you live now, Mr. Percudani?"
11. "Mr. Percudani, were you born in 1903?"
12. "Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?"
13. "Are you married, Mr. Percudani?"
14. "Let me ask you this: Is the Gotham Claims Agency a trade name?"
15. "And are you and Mr. Bluestein the only partners in that concern?"
16. "Are your offices at 16 Court Street, Brooklyn, New York, sir?"
17. "Is the principal work of Gotham Claims Bureau investigating cases for attorneys?"
18. "Have you personally, Mr. Percudani, referred any cases to attorneys?"
19. "Have you done any investigating work for an attorney named David Goldner?"
20. "Have you referred a number of cases to Mr. Goldner?"
21. "Have you produced today, Mr. Percudani, your financial records?"
- [fol. 53] 22. "Have you produced your records, reports, statements, bills pertaining to any and all investigations or business of any nature for or concerning I. Frank Miller, attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?"
23. "Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?"
24. "Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?"

and whereas therefore the said Neal Percudani did in the immediate view and presence of said Court and Justice contumaciously, unlawfully and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and whereas said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation, ordered as aforesaid by the said Appellate Division, and the due and orderly administration of justice;

And whereas the said Court and Justice having ordered that said Neal Percudani reappear before said Court and Justice on April 24, 1958;

And whereas the said Neal Percudani, having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, [fol. 54] the said Neal Percudani having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And whereas the said Neal Percudani did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

And whereas it was thereupon and therefore ordered and adjudged on April 24, 1958 by said Court and Justice that the said Neal Percudani then present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories was and is guilty of a criminal contempt (Sections 750(5), 751, Judiciary Law) by reason of the aforesaid contumacious, unlawful and unreasonable conduct in said Judicial Inquiry and Investigation; and whereas it was then further ordered and adjudged on April 24, 1958 by said Court and Justice that the said Neal Per-

judani be imprisoned and held in close custody in jail in the County of Kings, for thirty (30) days;

Now, THEREFORE, we command you that you take the body of the said Neal Percudani and safely keep him in your close custody in jail in the County of Kings for thirty (30) days; and you are to return this writ and make and return [fol. 55] to said Supreme Court in Kings County a certificate under your hand of the manner in which you have executed the same; and we further command you that you seal and impound this writ and you are to prohibit access to this writ without further command from this Court;

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of the Supreme Court, at the Borough Hall in the Borough of Brooklyn, County of Kings, City and State of New York, this 24 day of April, 1958.

By the Court      JOSEPH B. WHITTY  
Clerk

GEORGE A. ARKWRIGHT  
J. S. C.

[fol. 56]

EXHIBIT "D" TO AFFIDAVIT

SUPREME COURT  
OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT  
AND KINGS COUNTY

Kings County File No. 12256-1957

In the Matter of the Application of

ANONYMOUS No. 7,

Petitioner,

for an order pursuant to Article 78 C P A to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent.



**NOTICE OF APPEAL**

**PLEASE TAKE NOTICE** that petitioner hereby appeals to the Court of Appeals of the State of New York from an order dated and filed in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, Second Department, on the 26th day of May, 1958, confirming the determination and mandate made at the Additional Special Term (Judicial Inquiry) and entered in the office of the Clerk of Kings County on April 24, 1958, adjudging petitioner guilty of a criminal contempt of court.

**PLEASE TAKE FURTHER NOTICE** that this appeal is taken as of right on the ground that there is directly involved the construction of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Dated, Brooklyn, New York  
May 27, 1958.

**RAPHAEL H. WEISSMAN,**  
Attorney for Petitioner  
(Neal Percudani)  
Office & P. O. Address  
185 Montague Street,  
Brooklyn 1, New York.

[fol. 57]

To: **DENIS M. HURLEY, Esq.**  
Attorney for Respondent  
Room 301  
Borough Hall  
Brooklyn 1, New York

**HON. JOHN J. CALLAHAN**  
Clerk of the Appellate Division,  
Second Department

**HON. JOSEPH B. WHITTY**  
Clerk of the County of Kings.

[fol. 58]

## EXHIBIT "E" TO AFFIDAVIT

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of

ANONYMOUS No. 7,

Petitioner-Appellant,

for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of theHONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent-Respondent.

## ORDER TO SHOW CAUSE

Upon (1) the affidavit of petitioner (Neal Percudani), sworn to May 29, 1958; (2) a copy of the notice of appeal to the Court of Appeals, dated May 27, 1958; (3) a copy of the undertaking dated May 27, 1958, to perfect the appeal; (4) a copy of the surety bond filed in the office of the Clerk of the Appellate Division, Second Department, and (5) a copy of the decision of the Appellate Division, Second Department, dated May 26, 1958,

LET the respondent or his counsel show cause on the 24th day of June, 1958, at 2 o'clock in the afternoon at the Court of Appeals Hall, Albany, New York,

WHY an order should not be made herein:

- (a) allowing the appeal in this court to be heard upon certified copies of the notice of appeal and of the Appellate Division decision and order on appeal, dated May 26, 1958, and the original record on file in the office of the Clerk of the Appellate Division, Second Department, consisting of the order to show cause dated April 26, 1958, made by Mr. Justice Murphy, the petition, verified April 25, 1958, the

commitment dated April 24, 1958, thereto attached [fol. 59] as an exhibit, the answer and return, verified the 29th day of April, 1958, certified copies of the order and mandate each dated April 24, 1958, thereto attached, together with the stenographic record of the testimony and directing the return of said original record by the Clerk of the Appellate Division, Second Department, to this Court for such purpose and dispensing with the printing, serving and filing of any other copies thereof; and

- (b) allowing the filing by each side of seven typewritten copies of the brief and serving of one copy and dispensing with the printing, serving and filing of any other copies thereof; and
- (c) staying the enforcement of the order of the Appellate Division and of the determination and order of the respondent herein pending the hearing and determination of the appeal herein.

Sufficient cause appearing therefor, IT IS ORDERED that, in the meantime, and pending the hearing and determination by this Court of petitioner's application for a stay as aforesaid, the enforcement of the order of the Appellate Division and of the determination and order of the respondent herein be and it hereby is stayed, pursuant to Section 598-a of the Civil Practice Act, upon condition that petitioner file a surety bond, in the nature of a bail bond, in the sum of \$2,500.00.

Sufficient cause appearing therefor, LET service of a copy of this order to show cause and the papers upon which it is based upon the respondent's attorney on or before the 13th day of June, 1958, at 2 o'clock be deemed sufficient service hereof.

Dated, Brooklyn, New York  
June 10, 1958

(Signed) ALBERT CONWAY  
Chief Judge of the Court of Appeals  
of the State of New York

[fol. 60]

## EXHIBIT "F" TO AFFIDAVIT

COURT OF APPEALS  
OF THE STATE OF NEW YORKIn the Matter of the Application of  
ANONYMOUS No. 7,

Petitioner-Appellant,

for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of theHONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent-Respondent.

## AFFIDAVIT

STATE OF NEW YORK,  
COUNTY OF KINGS, ss.:

NEAL PERCUDANI, being duly sworn, says:

I am the appellant herein. I make this affidavit in support of the relief sought by the attached order to show cause.

This is an appeal from an order dated May 26, 1958, of the Appellate Division, Second Department, unanimously affirming a mandate under which appellant was lodged in City Prison on April 24, 1958. A correct copy of the decision of said Appellate Division is hereto attached.

The mandate was made by Mr. Justice Arkwright at the Additional Special Term, Kings County (Judicial Inquiry) on April 24, 1958, as punishment for alleged criminal contempt, citing "Sections 750(5), 751, Judiciary Law."

"Such" mandates "are reviewable by a proceeding under article seventy-eight of the civil practice act" (Section 752, Judiciary Law).

[fol. 61] The Appellate Division order on appeal is a final order in such proceeding.



Correct copies of my notice of appeal to this Court and the undertaking to perfect it are hereto attached. The notice of appeal and undertaking were served upon the attorney for the respondent and filed in the office of the Clerk of the Appellate Division, Second Department and in the office of the Clerk of Kings County.

I was sentenced to prison for 30 days.

After serving two days I was released on a \$2500 bond filed in the office of the Clerk of the Appellate Division, Second Department, by order to show cause made by Mr. Justice Murphy of said Appellate Division on April 26, 1958. A correct copy of said bond is hereto attached.

The mandate recites that I was duly sworn as a witness, ordered to answer specified questions and that I refused to do so in the immediate view and presence of the Court.

It is admitted by respondent's answer that I requested representation by counsel in court during the questioning and that I refused to answer only after my request was denied by Mr. Justice Arkwright.

It was made clear to Mr. Justice Arkwright that my claim to the right to have my counsel present during the questioning was under the due process clause of the Fourteenth Amendment of the United States Constitution.

Thus the question on this appeal is whether the exclusion of my counsel during the questioning was a denial to me of such due process in the special facts of this case.

[fol. 62] Hence this appeal lies as of right under Section 588, subdivision 1 (a), Civil Practice Act, on the constitutional ground.

I am not an attorney at law.

I am a licensed private detective and investigator. I am a partner in such business conducted under a trade name.

I repeatedly protested to Mr. Justice Arkwright that I was being questioned as a person accused of crime and not as a mere witness, and that the accusation had been made by a member of the staff of the Judicial Inquiry.

Mr. Justice Arkwright held a hearing on this. Here is the text of the admissions by the staff member in question (which is found at pages 92-94\* of the stenographic transcript, except that underscoring is supplied):

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\* Printed herein at pages 115-116.

"BY THE COURT:

Q. You heard what was said. Do you wish to say anything?

A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his client in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from defendants, holding themselves out to be from defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to them to find out if these [fol. 63] statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my

opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done."

The public press shows that reference by the Judicial Inquiry to the District Attorney was no idle threat. It was reported in the Brooklyn Section of the Third Edition of the New York World-Telegram, April 30, 1958, that

"The court investigators have been sending evidence to the district attorney's office since the first of this year.

A special rackets grand jury was impaneled March 3 to investigate criminal activity on the part of Brooklyn attorneys and last week returned its first indictment. \* \* \*

[fol. 64] In the special circumstances of this case, the denial of representation by counsel during questioning was a denial of due process of law. I was being questioned as a person already accused of crime. In the language of the staff member quoted above—against me—the "investigation had disclosed \* \* \* there was prima facie evidence \* \* \* to refer this matter to the district attorney."

True, I could invoke the privilege against self-incrimination. But I am not a lawyer. I needed the guiding hand of counsel to be present and to advise me as to my right to do so during the course of the questioning:

My appeal presents a substantial due process question. I am advised by counsel and I verily believe that my case is not within the decisions heretofore made by the Appellate Division in the cases of M & S Anonymous, because of the special facts presented by my case. Even so, neither this Court nor the United States Supreme Court has as yet passed upon the question. This Court, I am advised, merely denied leave to appeal in M Anonymous where

questions other than the constitutional question were also sought to be reviewed. There was no attempt there to review the constitutional question alone.

I am advised by counsel that *Matter of Groban* (252 U.S. 530), which is cited in *M Anonymous*, supports my claim in the exceptional circumstances of my case for the following reasons, as I am advised and believe: That was a five-to-four decision. There were, however, three opinions: a majority opinion by three against the claim of representation [fol. 65] on the facts of that case; a concurring opinion by two; and a solid dissenting opinion by four in support of the constitutional claim of representation even on the facts of that case. All opinions support the constitutional claim to representation by counsel during questioning in the instant exceptional circumstances.

The majority opinion states (352 U.S. 333):

"The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts in support of such a belief, does not bar the taking of testimony in a private investigatory proceeding."

Here the case went far beyond mere suspicion. Here there were admitted facts to show that my belief was justified. Here there was an actual threat to send a prima facie case of crime against me to the District Attorney.

The concurring opinion there states (352 U.S. 336):

"This is not a statute directed to the examination of suspects."

Here I was not only suspect. I had already been accused of crime and a prima facie case against me was ready to be referred to the District Attorney.

The concurring opinion in *Groban* further states (352 U.S. 337):

"What has been said disposes of the suggestion that, because this statute relating to a general administrative, non prosecutorial inquiry into the causes of fire is sustained, it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained."



[fol. 66] Here is no "administrative" inquiry in the sense of that quotation. Here is a judicial inquiry. This is not a problem of semantics. The mere fact that both administrative and judicial departments of government make inquiries does not identify them in the face of due process. A court in any aspect of its function is the last place in the whole world where full due process should be denied.

It is absurd to identify the reality of the power here exercised with that in *Groban*. There is here no such attendant urgency as that involved in investigating the cause of a fire. The exclamation—"What's your hurry, where's the fire?"—is the very warp and woof of our language. This inquiry is designed to be conducted by a Justice of the Supreme Court in the calm atmosphere and with all the paraphernalia of a courtroom, including a large staff of counsel on one side.

If this were not the exercise of a judicial power there would be no foundation for the exercise of the power to punish for contempt. For here the mandates were made in the exercise of the power of a "court" (Section 750, Judiciary Law).

And here the "secret inquisitorial powers" are in effect exercised for purposes of the "District Attorney." It already appears that the public press announced that "The Court investigators have been sending evidence to the district attorney's office since the first of this year."

The concurring opinion in *Groban* further states (352 U.S. at p. 337):

[fol. 67] "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Here, let it not be forgotten that I had already been accused of a *prima facie* case of crime which was ready to be referred to the District Attorney.

The position in which a person called to testify finds himself in does not depend upon how the judge describes it, whether "witness" or accused. It depends upon the facts. It does not dissipate a person's peril as an accused if the

judge tells him he is a witness, as was done here by Mr. Justice Arkwright. The justice had no power to grant him immunity from the prima facie case that was ready to be sent to the District Attorney.

In the answer herein Mr. Justice Arkwright wrote:

"While respondent recognizes that the claims of some witnesses to the desirability of having counsel present may be stronger in some cases than in others (because, for example, they may themselves later possibly become implicated in wrong doing), any relaxation \* \* \* ."

etc.

Before a person is himself "implicated" there is still some room for exercise of discretion depending upon proximity to such implication.

Once, however, as in the instant proceedings, the persons have already been implicated there is no longer room for the exercise of discretion. A denial of the claimed representation after implication is a denial of due process.

[fol. 68] Continuing the last quotation made from the answer of Mr. Justice Arkwright in these proceedings:

"any relaxation of the rule as to counsel would not only result in different treatment for different witnesses, but would soon jeopardize all privacy of the proceedings before the Judicial Inquiry."

A "different treatment" for different objective situations, as in the case of petitioner, is of the very essence of due process. It is only "different treatment" for the same objective situations that is abhorrent to equality before the law. Equally abhorrent is the same treatment for different objective situations.

As to the privacy of the Judicial Inquiry. Exceptional circumstances such as those at bar will be only few. The lawyers then allowed to be present can surely be depended upon to maintain the necessary privacy. Lawyers have for centuries been entrusted with confidential communications involving the very lives of others. They have not been found wanting. It would be lamentable if the Judicial Inquiry had to be conducted on the predicate that the Bar could not

in exceptional circumstances be trusted to maintain the necessary privacy.

Denial of the claimed rights of representation by counsel was in the exceptional circumstances herein, a denial of due process.

The stay requested should be granted. Otherwise my right to appeal would be frustrated. For I will have been imprisoned the full 30 days until my appeal can be finally decided. On the application for the stay before Mr. Justice [fol. 69] Murphy, counsel for respondent candidly admitted that a stay pending appeal would not impede the Judicial Inquiry. The same is true now.

There is no need for any further bond in connection with the stay. The bond already on file fully protects the interests of the Judicial Inquiry.

The relief with respect to the record on appeal and the briefs should be granted in order to protect the privacy of the inquiry. If printing is required there can be no assurance of that. If the appeal is heard as requested, the privacy can easily be protected.

I am a citizen of the United States. My business office is in Brooklyn, New York. I am married and live with my wife and three small children at 1489 Lake Shore Drive, Massapequa Park, Nassau County, State of New York, in a home owned by us.

An order to show cause is necessary because there is need for the stay.

No previous application has been made for this or similar relief.

Wherefore deponent prays for the relief in the order to show cause.

/s/ NEAL PERCUDONI

Sworn to before me this  
29th day of May, 1958.

/s/ Gertrude E. Maguire

GERTRUDE E. MAGUIRE

NOTARY PUBLIC, State of New York

Qualified in Queens County

No. 41-7665300

Commission Expires March 30, 1960

[fol. 70]

## EXHIBIT "G" TO AFFIDAVIT

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

Present:

HON. GERALD NOLAN,

Presiding Justice,

" HENRY G. WENZEL, JR.,

" GEORGE J. BELDOCK,

" CHARLES E. MURPHY,

" HENRY L. UGHETTA,

Associate Justices.

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice, by Attorneys and Counselors-at-Law and by Others Acting in Concert with Them in the County of Kings.

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

NOW, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made;



(1) With respect to the alleged improper practices and [fol. 71] abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, AN ADDITIONAL SPECIAL TERM OF THE SUPREME COURT, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice GEORGE A. ARKWRIGHT, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that DENIS M. HURLEY, Esq., an attorney and [fol. 72] counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

ENTER:

GERALD NOLAN,  
Presiding Justice.

[fol. 73]

EXHIBIT "H" TO AFFIDAVIT

IN THE ADDITIONAL SPECIAL TERM OF THE  
SUPREME COURT OF NEW YORK, COUNTY OF KINGS

In the Matter of the Application of  
ANONYMOUS No. 6. ETC.

In the Matter of the Application of  
ANONYMOUS No. 7. ETC.

Stenographer's Minutes of Proceedings of  
April 22 and 24, 1958

[fol. 1]

IN THE MATTER OF THE PETITION OF THE BROOKLYN  
BAR ASSOCIATION FOR A JUDICIAL INQUIRY, ETC.

Brooklyn, N. Y., Tuesday, April 22, 1958.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Who is first?

Mr. Donlan: Mr. Zangara, the attorney for Neal Percudani and Howard Bluestein. They are the partners of the Gotham Detective and Claims Adjustment Bureau. He is attorney for them.

(Anthony Zangara, Esq., entered the courtroom.)

The Court: This is on Neal Percudani?

Mr. Hurley: This involved the Gotham Detective and Claims Adjustment Bureau, your Honor, and the witnesses we have called and asked to produce books are Howard Bluestein and Neal Percudani, both connected with the Gotham Detective and Claims Adjustment Bureau. They are represented by counsel here.

Are your clients ready to testify, Mr. Zangara?

Mr. Zangara: I want to make some motions with reference to subpoenas.

The Court: Let's take them one at a time. Which one do you want to deal with first, Percudani or Bluestein?

Mr. Zangara: If we would, your Honor, take them all together, because they concern one business.

The Court: No, I won't take them all together. I will [fol. 2] take them separately.

Mr. Zangara: With reference to Mr. Bluestein's subpoena.

The Court: All right.

Mr. Zangara: They were served with three subpoenas, Mr. Bluestein a subpoena duces tecum on November 21st, and—

The Court: That is '57, you mean?

Mr. Zangara: 1957. And a duplicate subpoena with reference to books and records itemizing certain records which your Honor wished—

The Court: When was that returnable?

Mr. Zangara: That was also November 21, 1957.

The Court: Yes. Then what was the third one, you said?

Mr. Zangara: Then another subpoena to Neal Percudani with reference to his books and records concerning attorneys.

The Court: How do the subpoenas differ?

Mr. Zangara: Well, two are addressed to the individuals, and one to their named business.

The Court: I see. All right.

Mr. Zangara: By the way, the proper name for the agency is Gotham Claims Bureau. These subpoenas were not addressed properly.

[fol. 3] Mr. Hurley: Gotham Claims Bureau?

Mr. Zangara: Bureau.

The Court: Is that a business?

Mr. Zangara: Doing business under a trade name.

The Court: Under an assumed name?

Mr. Zangara: That is right. It is filed in the office of the County Clerk.

The Court: That is by Neal Percudani and Howard Bluestein, I assume?

Mr. Zangara: That is correct, sir.

The Court: All right. What is the motion?

Mr. Zangara: Judge, on a prior occasion Bluestein and Percudani appeared here and at that time there were motions pending before the Appellate Division, and your Honor granted us an adjournment until these motions had been decided. Now, I understand from the newspaper—

The Court: Let's take them separately. Which motion do you wish to take up first?

Mr. Zangara: Well, there is a motion with reference to the subpoenas.

The Court: Yes. What is the motion?

Mr. Hurley: If your Honor please, at this point might I just clear this up. As counsel said, the matters were adjourned from time to time, and the original application he made when I think he was in here in December, December 4, was that the matters be adjourned pending a decision by the Appellate Division as to the right of a witness to have counsel in court, which of course has long since been decided by the Appellate Division.

The Court: Yes, that was decided adversely to your contention.

Mr. Zangara: I understand that, Judge.

Mr. Hurley: I think that was the only motion.

Mr. Zangara: At that time.

Mr. Hurley: The only matter that it was adjourned pending, the matter of right to counsel.

Mr. Zangara: Of course, the complete remedial effects of the Courts have not been decided; only by the Appellate Division at this time, as I understand it. In any event, I want to make a motion with reference to Mr. Bluestein.

The Court: In light of that, are you making a motion on that, or are you now making a motion—

Mr. Zangara: No, at this time, Judge, I would like to make a motion with reference to the subpoenas of the two individuals whose books and records have been subpoenaed.

The Court: What is the motion?

Mr. Zangara: I understand there is a motion pending [fol. 5] now in the Supreme Court with reference to quashing of subpoenas. That was published in the World Telegram of April 16th. And I wanted to ask the Court if they would stipulate until that motion has been decided?

The Court: No, I shall not. If you wish to make any motions you are at liberty to do so, but you will have to stand on your own feet.

Mr. Zangara: I see. Well, then we will make a motion with reference to each of the individuals named in these subpoenas.

The Court: They are here now and they are going to testify.

Mr. Zangara: To quash the subpoenas with reference to their books and records, and in fact the papers have been partially prepared now. I understand this motion hasn't been decided yet, is still pending.

The Court: Go ahead.

Mr. Zangara: I thought your Honor would wait until the outcome of that motion has been decided.

The Court: No, I will not. I told you—

Mr. Zangara: I think they will be similar motions.

The Court: All right.

Mr. Zangara: That is with reference to the books and [fol. 6] records.

The Court: All right. Is that all?

Mr. Zangara: That is all at this time.

The Court: All right. Then I will ask you to step outside. You may wait outside.

Which one do you want to take first, Mr. Hurley?

Mr. Zangara: If your Honor pleases, there have been



no personal subpoenas on these individuals. They are not before this Court as witnesses, according to the subpoenas served.

The Court: Are these men attorneys?

Mr. Zangara: No, they are not.

The Court: No. They are here as witnesses. Attorneys who are here come as witnesses also, but I mean these men are not attorneys.

Are you ready to examine them now, Mr. Hurley? Mr. Donlan?

Mr. Donlan: Yes.

Mr. Zangara: Judge, are you going to rule on this one point?

The Court: What is the point?

Mr. Zangara: They have not been subpoenaed personally.

The Court: The point is they are here.

Mr. Zangara: They haven't been called, technically speaking, before the Committee.

The Court: They are here and we are going to hear them.

Mr. Donlan: Your Honor, I might state that yesterday I think you asked to have these men come here.

Mr. Zangara: He did ask.

Mr. Donlan: I presume you understand that when they were asked to come here it was to appear before the Court to testify. If there is some misunderstanding on that point I will serve you with subpoenas.

The Court: They are here now, Mr. Donlan. We can go right on with them if you are ready, whatever you wish.

Mr. Donlan: I asked him to produce the men. I don't have to subpoena everybody. We can ask an attorney to ask his men to appear. We do that every day.

Mr. Zangara: I have produced them according to the Judge's request.

Mr. Donlan: We asked them to come to question, not to just look at them.

Mr. Zangara: Judge, I would like to state something else with reference to their testimony, for the record. The right to counsel has been questioned as far as the Appellate Division, as I understand it, at this time, but the

[fol. 8] complete remedies of the Courts have not been exhausted, and my clients have told me, and they feel under the circumstances that they wish counsel to be present when they are examined.

The Court: I have ruled on that. Don't bring that up again. It has been decided. I don't care what they wish. We are not going by what people wish.

Mr. Hurley: Your Honor, I think Mr. Zangara has said twice that it has only been through the Appellate Division. I think it ought to be put on the record here that Mr. Zangara should be informed that in that matter it was so decided in the Appellate Division adversely to his contention, the petitioner in the Matter of M. Anonymous attempted to go to the Court of Appeals and ask permission to appeal to that Court from the ruling of the Appellate Division, and on April 3, 1958, the Court of Appeals denied permission to appeal to the Court of Appeals.

Mr. Zangara: I didn't know that.

The Court: All right. Let's take the first witness.

Mr. Hurley: May I also say this for Mr. Zangara's benefit: He was asking for an adjournment pending the other matters, and I understand your Honor is ruling [fol. 9] against him on that. But if he intends to make motions, I think it should be made clear that your Honor has ruled consistently here that under the Civil Practice Act and under your Honor's ruling motions must be made in writing in each individual case and must stand on their own feet; must be made in writing under the Civil Practice Act and not orally in court.

The Court: Are you ready, Mr. Hurley and Mr. Donlan? Just what do you wish to do? Which one do you want to start with?

Mr. Donlan: Neal Percudani, your Honor.

The Court: All right, we will take Percudani.

Mr. Donlan: I want to ask the other man to step out.

The Court: The other gentleman, step outside.

Mr. Bluestein: Your Honor—

Mr. Percudani: At this moment, your Honor—

The Court: Who is Mr. Percudani?

Mr. Percudani: I am Mr. Percudani.

The Court: You are the man we want to stay here.

Mr. Percudani: Just a second, your Honor.

The Court: I am running this court, not you. The other two step outside.

The Court Officer: Step outside, please.

Mr. Percudani: May I say something, your Honor?

[fol. 10] The Court: Not yet, until they get out of the room.

(Mr. Zangara and Mr. Bluestein left the courtroom.)

The Court: All right.

Mr. Percudani: May I say something, your Honor?

The Court: Yes.

Mr. Percudani: I am not an attorney, so naturally—

The Court: You have your attorney here.

Mr. Percudani: Apparently you ordered him out of the room, sir, and I would like that on the record. I would like that put down.

The Court: You are not stating this correctly. I told him after he had made his motions and so forth to step out of the room.

Will you bring this attorney back? You have an attorney, let him speak for you. Now, sit down.

Mr. Percudani: Your Honor—

The Court: I will bring him back.

Mr. Donlan: Your attorney speaks for you.

The Court: Just sit down.

(Mr. Zangara entered the courtroom.)

The Court: Your client wishes to say something to you, and he wants to speak, but you represent him, and I will hear you after you have consulted with him.

[fol. 11] (Mr. Zangara and Mr. Percudani consulted in the rear of the courtroom.)

The Court: All right, Mr. Zangara, you have been talking with your client now.

Mr. Zangara: He has advised me that he does not wish to testify without the presence of an attorney representing him.

The Court: That has been ruled on by the Courts.

Mr. Zangara: I understand that. I told him to take the stand and to make that clear to your Honor.

Secondly, I want to make objection to it as well that he has not been served with a subpoena personally to appear before this Committee. You requested his presence and I brought him in. Under those circumstances, I feel that the Committee, that your Honor cannot force him or ask him to testify without—

The Court: I overrule that contention. Take the stand.

[fol. 12] NEAL PERCUDANI, 1489 Lake Shore Drive, Massapequa Park, Long Island, New York, called as a witness, being first duly sworn, testified as follows:

By Mr. Donlan:

Q. Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau located in Brooklyn, New York?

The Witness: At this particular time, on advice of counsel, by not being represented by an attorney, I refuse to answer any questions, sir.

The Court: I direct you to answer the question.

The Witness: On advice of counsel, sir.

The Court: I direct you to answer the question.

The Witness: Sir, is it possible I may speak to you alone and find out what this is all about?

The Court: No, you cannot speak to me alone. I direct you to answer the question.

The Witness: On advice of counsel, sir, I have to refuse.

The Court: All right. I will hold you in contempt of Court.

The Witness: All right, sir.

The Court: And I give you fair warning. I will let you go out and consult counsel and come back. Now you do that. You may go out and consult counsel, but I intend [fol. 13] to get serious about this.

The Witness: If I can state something off the record—I just want to know a few facts.

The Court: I don't want anything off the record. You may go out and consult counsel.

(The witness retired from the courtroom and later returned.)

Mr. Donlan: Do you want me to question him now?

The Court: Yes.

By Mr. Donlan:

Q. Mr. Percudani, you left the courtroom and conferred with your attorney?

The Court: You have conferred with your attorney?

The Witness: Yes. Upon conferring with my attorney, sir, I will still have to state that without counsel being present I cannot answer any questions, sir.

Q. Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—

The Witness: Sir, I will still have to state, without my attorney being present, I cannot answer any of these particular questions.

The Court: Read the question, please.

[fol. 14] (The last question was read by the reporter.)

The Court: What is the answer to that?

The Witness: Sir, I will still have to maintain that without my counsel being present I feel that I cannot answer these questions.

The Court: I direct you to answer the question. Do you refuse to answer it?

The Witness: I am sorry, sir. Yes, sir.

The Court: All right.

Q. Are you in partnership with Mr. Howard Bluestein in the organization called Gotham Claims Bureau, Mr. Percudani?

The Witness: Once again, sir. I will still have to refuse to answer that particular question.

The Court: I direct you to answer the question. Do you refuse a second time?

The Witness: Yes, sir.

The Court: All right.

Q. In connection with Gotham Claims Bureau, Mr. Percudani, would you tell this Court what attorneys you do investigating work for?



The Witness: Once again I will have to refuse to answer that question on the ground of my attorney not being present at this hearing.

[fol. 15] The Court: I direct you to answer the question. Do you refuse to answer it?

The Witness: Yes, sir.

The Court: All right.

Q. How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you or Mr. Bluestein?

The Witness: Once again, sir, I refuse to answer that question on the ground of my attorney not being present at this hearing.

The Court: Will you speak a little louder? I direct you to answer the question.

The Witness: I am sorry, sir.

The Court: You refuse?

The Witness: Yes, sir.

The Court: All right.

Q. Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?

The Witness: I believe I answered that question previously, sir. Your Honor, I answered that question previously. I believe he asked me.

The Court: There has been no answer to any question here so far.

Mr. Donlan: I point out to Mr. Percudani that I am now [fol. 16] asking, was he employed by the Consolidated Mutual Insurance Company at 100 Clinton Street as an investigator prior to the time that he and Mr. Bluestein formed the Gotham Claims Bureau? That question has not been asked.

The Witness: I will have to state, sir, once again that I cannot answer that question on the ground my attorney is not present.

The Court: You mean you refuse to answer it?

The Witness: I refuse to answer it.

The Court: All right, I direct you to answer it.

The Witness: I am sorry, sir.

The Court: You refuse again?

The Witness: I will have to.

The Court: All right.

Q. Mr. Percudani, did you work in connection with your business, the Gotham Claims Bureau, for an attorney named I. Frank Miller at any time?

The Witness: Once again, sir, I will have to refuse to answer that question on the ground of my attorney not being present at this hearing.

The Court: I direct you to answer it.

The Witness: I am sorry, sir.

The Court: You refuse?

[fol. 17] The Witness: Yes, sir.

Q. Mr. Percudani, did you in connection with your business—

The Court: A little louder, Mr. Donlan.

Mr. Donlan: I have a cold.

Q. Mr. Percudani, did you in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?

The Witness: I refuse to answer that question, sir, on the ground of my attorney not being present at this hearing.

The Court: I direct you to answer the question.

The Witness: I am sorry, sir.

The Court: You refuse?

The Witness: Yes, sir.

Q. Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?

The Witness: I refuse to answer that, sir, on the ground of my attorney not being present at this hearing, not being represented by counsel.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Mr. Donlan: Your Honor, may I speak to you a moment?

[fol. 18] The Court: Yes, surely.

(Discussion at Bench off the record.)

Mr. Hurley: If your Honor please, Mr. Donlan is terribly troubled with a cold, and he has asked me to take over and ask some questions here.

The Court: All right, Mr. Hurley.

By Mr. Hurley:

Q. Mr. Percudani, how old are you, sir?

The Witness: I refuse to answer any questions, sir, on the ground of my attorney not being present at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. Where do you live now, Mr. Percudani?

The Witness: I refuse to answer any questions on the ground of my attorney not being present, sir.

The Court: I direct you to answer the question.

The Witness: I am sorry, sir.

The Court: You refuse?

The Witness: Sir, that is one of the questions originally obtained when I originally sat here, at the beginning. You already know that, sir.

Q. Mr. Percudani, were you born in 1903?

[fol. 19] The Witness: Sir, I will not answer any questions on the ground of my attorney not being present at this particular hearing.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?

The Witness: On the ground of my counsel not present, sir, I will not answer any question, sir.

The Court: I direct you to answer the question.

The Witness: Sorry, sir.

The Court: Do you refuse?

The Witness: Yes, sir, I will have to refuse.

Q. Are you married, Mr. Percudani?

The Witness: Sir, I refuse to answer any and all questions that are asked me while my attorney is not present. If my attorney is brought in here, sits down here, with advice, I will answer any one of your questions, sir, within reason.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that particular question, sir.

The Court: You have been advised that that matter has been ruled upon by the Courts, and that I have ruled against [fol. 20] the presence of your attorney while you are testifying. You know that, don't you?

The Witness: Sir, may I speak freely?

The Court: I say, you know that, don't you?

The Witness: I am aware of it now.

The Court: You were present.

The Witness: Yes, sir, I was aware of that, sir.

The Court: All right.

The Witness: As I understand, that ruling has not been given to the Supreme Court, is that correct, sir?

The Court: It has been taken care of by the Appellate Division.

The Witness: I know that.

The Court: You have a lawyer.

Q. Is the Gotham Claims Bureau—

The Court: I have told you that that has been ruled on. Mr. Hurley has told you the same thing. You had a lawyer here. Now, if you want to change your testimony I will give you a chance to do it, but I am going to hold you in contempt of Court.

The Witness: Sir, I don't know what you are looking for. I am confused in this whole entire matter. I am still aware of the fact—

[fol. 21] The Court: Why don't you answer the questions?

The Witness: Sir, I can't understand why we cannot have an attorney present. I know that everywhere—

The Court: Because that is the ruling. It has been sustained by the Appellate Division. A witness is not entitled to have an attorney present.

The Witness: Sir, I don't know if I am a witness or if I am a defendant here. I am not aware of that.

The Court: You are a witness, I have told you.

The Witness: I was practically told I was a defendant before I got here. Let me put it on record.

The Court: I don't know who told you that.

The Witness: Here is a gentleman sitting here and another gentleman told me, sir.

Mr. Donlan: Just a moment. Who told you you were a defendant?

The Witness: You and another gentleman who was here.

Mr. Donlan: I told you?

The Witness: Yes, sir, if you want me to put it on record. That is why I want to talk to you if I have a chance, but you won't permit it.

Mr. Donlan: I don't think I have ever spoken to the man [fol. 22] before.

The Court: I will give you a chance.

The Witness: If I may talk to you off the record and explain something, but you won't permit me.

The Court: We can't talk off the record. It has got to go on the record.

The Witness: I don't want to make any accusations. He is doing his job efficiently.

The Court: I am telling you as the Judge presiding here that you are merely here as a witness.

The Witness: Your Honor, if I may state—

The Court: We will have those questions asked again, if you wish to answer them. But there is no use of our going through them if you are going to refuse to answer because your counsel is not here. I have told you that that has been ruled upon.

The Witness: Your Honor, as I stated—

The Court: Is that your only reason for refusing to answer?

The Witness: At this particular time, sir, if I may speak freely, I was told—

The Court: You speak freely right now.

The Witness: When we came up here a second time I was practically told, they made certain accusations of us [fol. 23] and told what they were after us for. If you want



me to state them, I don't want to make any statements on the record here, the fact that I—well, I am a little confused and upset, but if you want I will talk to you and I will explain them to you. That is why I am a little frightened; I don't know what is going on.

The Court: What is it you want to explain?

The Witness: May I talk freely, sir?

The Court: You may talk freely.

The Witness: All right. When we first came up here originally we were told first of all there were certain statements they are questioning, they feel if we want to make a deal with them, they can't promise us anything, but certain statements were taken, may have been not true statements, and et cetera, et cetera. My partner is out there, and if you call him in, sir, I mean, that is what was said.

The Court: What I am interested in now, you are called here as a witness.

The Witness: Well, that is why I am confused, sir.

The Court: You have been asked certain questions, all of which you have refused to answer because your counsel is not present.

[fol. 24] The Witness: On advice of counsel, yes, sir.

The Court: And that is your present stand, isn't it?

The Witness: Yes, sir. It will have to be, sir.

The Court: All right.

Is there any other question, Mr. Hurley?

Mr. Hurley: I would like to ask a few more.

By Mr. Hurley:

Q. Mr. Percudani, as I understand what you are saying, your only refusal to answer the questions that have been asked you so far is on the ground that your attorney is not allowed in the courtroom with you, is that right?

A. He is not present, yes, to advise me, sir, yes, sir.

Q. To advise you and to act as your attorney here in the courtroom?

A. Yes, sir.

Q. In other words, it is the absence of counsel that is the basis for your refusal to answer?

A. Yes, sir.

Q. And no other reason, is that right?

A. Well, sir, I have reasons of my own, there are other reasons, that I am a little confused, but at this particular time, not being an attorney, I will go on the advice of my attorney not to answer any questions without his presence [fol. 25] here, sir.

Q. Let me ask you this: Is the Gotham Claims Agency a trade name?

The Witness: Sir, I will have to refuse to answer that without my attorney being present.

The Court: I direct you to answer the question.

The Witness: Sorry, sir.

Q. And are you and Mr. Bluestein the only partners in that concern?

The Witness: Once again, sir, I will have to refuse to answer that on the advice of counsel, not being present at this hearing.

The Court: I direct you to answer the question.

The Witness: Sorry, sir.

The Court: Do you refuse?

The Witness: Yes, sir.

The Court: All right.

Q. Are your offices at 16 Court Street, Brooklyn, New York, sir?

The Witness: Sir, I will have to refuse to answer that on the grounds of my counsel not being present.

Q. How many employees do you have in your office?

The Witness: I will have to refuse to answer.

[fol. 26] The Court: Wait a minute. Let's go back. I direct you to answer that prior question, the one just before this.

The Witness: Sir, I will have to refuse to answer that.

The Court: All right. Now this latter question; the one that followed that, I direct you to answer that question.

The Witness: I will also have to refuse to answer that, sir.

The Court: All right.

Q. Did you personally do any work for an attorney named I. Frank Miller?

The Witness: That question was asked me previously sir, and I have answered that—I didn't answer, I refuse to answer that particular question.

The Court: I direct you to answer it.

The Witness: I refuse, sir.

Q. Is the principal work of Gotham Claims Bureau investigating cases for attorneys?

The Witness: I will have to refuse to answer that, sir, on the ground of my attorney not being present at this time.

The Court: I direct you to answer the question.

[fol. 27] The Witness: I will have to refuse, sir.

Q. Have you personally, Mr. Percudani, referred any cases to attorneys?

The Witness: I will have to refuse to answer that, sir, on the ground of my attorney not being present.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. Have you done any investigating work for an attorney named David Goldner?

A. I will have to refuse to answer that question on the ground that my attorney is not present at this hearing.

The Court: I direct you to answer it.

The Witness: I will have to refuse, sir.

Q. Have you referred a number of cases to Mr. Goldner?

The Witness: I will have to refuse to answer that, sir, on the ground of my attorney not being present at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. How long have you known Mr. Howard Bluestein?

The Witness: I refuse to answer that question, sir, on the ground of my attorney not being present at this hearing.

[fol. 28] Q. Have you produced today, Mr. Percudani, your financial records?

The Witness: I refuse to answer that question, sir, on the grounds of my attorney not being present, sir.

The Court: I direct you to answer the question.

The Witness: Sorry, I refuse, sir.

Q. Have you produced your records, reports, statements, bills pertaining to any and all investigations or business of any nature for or concerning I. Frank Miller, attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?

The Witness: I refuse to answer that question, sir, on the ground of my attorney not being present at this time.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?

The Witness: Sir, I will have to refuse to answer any particular question at this time, being my attorney is not [fol. 29] present at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

Q. Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?

The Witness: I will have to refuse to answer that question on the grounds my attorney is not sitting at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse.

The Court: I think that is enough, Mr. Hurley.

Mr. Hurley: Just this one general question:

Q. Mr. Percudani, then I understand, so we will make this clear, that no matter what questions are asked you from here on, no matter what questions I ask of you, you would refuse to answer on the ground that your attorney is not present here in the courtroom while you are being examined, is that right?

A. Yes, sir.

Q. That is the basis of your refusal to answer?

A. Yes, sir, at this particular time, sir, yes.

Q. And that would be the basis of your refusal to answer all other questions that I might ask you, is that so, sir?

[fol. 30] Q. And that is the only reason at this time, sir?

A. At this time, sir.

Mr. Hurley: That is all, your Honor.

The Court: All right. I hold you in contempt of Court. Will you prepare the necessary papers, Mr. Hurley? And you just sit over there.

The Witness: Your Honor, may I ask a question, sir?

The Court: No, we have had enough. You have been asked enough questions, and been given plenty of time. In fact, we have given you all the time I can give you.

The Witness: You are not permitting me to talk to you, and yet you talked to these gentlemen on the side here, and yet you won't permit me to talk to you.

The Court: What is it you wish to ask?

The Witness: Well, all right, sir. Never mind. Thank you, sir.

Mr. Hurley: Now I intend to call the partner.

The Court: Yes. Just hold him then. You will have to take him outside. Prepare your papers.

(Witness excused.)

[fol. 31] HOWARD BLUESTEIN, 5413 Kings Highway, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

The Witness: I was sworn before.

Examination by Mr. Hurley:

Q. How old are you, Mr. Bluestein?

The Witness: Your Honor, I refuse to give any testimony unless I am afforded the right of counsel.

The Court: Mr. Bluestein—Bluestein, is it, or Bluestone?

The Witness: That is right, Bluestein.



The Court: Well you were informed here—your counsel was informed, and I so inform you again that that has been ruled upon by the Appellate Division, and that counsel at my direction may or may not be allowed in the room while a witness is being examined.

I have ruled here that in this case, and in all that have been before me, that counsel will not be allowed in the room while a witness is being examined.

I am telling you that and you may be guided accordingly now. You have your counsel, so you take your advice from your counsel. I assume you have gone over it very carefully [fol. 32] fully with him. He is outside.

The Witness: I haven't gone over it as carefully as I would have liked to.

The Court: If you wish to go out, I will suspend for a few minutes and let you go out.

The Witness: No, your Honor, because I understand that the United States Supreme Court has not ruled on it yet.

The Court: All right, go ahead, Mr. Hurley. You don't wish to go out then?

The Witness: No, sir.

(The question was read by the reporter as follows: "How old are you, Mr. Bluestein?")

The Court: How old are you, Mr. Bluestein, that is the question. What is your answer to that?

The Witness: I am 32.

By Mr. Hurley:

Q. Are you married, sir?

A. Yes, sir.

Q. Have you got a family?

A. Yes, sir.

Q. Where you live on Kings Highway, 5413, that is an apartment house, is it?

A. Yes, sir.

[fol. 33] Q. And how long have you been in business in The Gotham Claims Bureau?

The Witness: I refuse to answer any other questions unless I have counsel present.

The Court: Well, you will have to direct that to a particular answer, you will have to direct it to a question. So read the question.

(The question was read.)

The Witness: I refuse to answer any other questions.

The Court: No, no, just this one question. Take the one question.

The Witness: Look, your Honor, I am not thoroughly familiar with my rights. I don't know whether you people are here to entrap me or what. I am not a lawyer, I don't know what rights I have violated already by just sitting down here.

The Court: We are not trying to entrap you at all. You are asked a question, and you may answer it or not answer it, as you see fit.

The Witness: I am not going to answer any questions unless I have counsel present.

The Court: Will you read the question.

(The question was read.)

[fol. 34] The Court: Do you refuse to answer it?

The Witness: I am not going to answer any other questions—

The Court: Do you refuse to answer that question?

The Witness: I refuse to answer that question unless I have counsel present.

The Court: All right, that is perfectly all right. Now I direct you to answer the question. You may refuse again if you wish.

The Witness: I refuse to answer that question unless I have counsel present.

The Court: That is perfectly all right.

Ask him the next question.

By Mr. Hurley:

Q. In the Gotham Claims Bureau is your partner Neal Percudani?

The Witness: I refuse to answer that question unless I have counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the rights of counsel.

The Court: All right.

Q. Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the County Clerk's office?

[fol. 35] The Witness: Can I make the same objection?

The Court: You may state whatever you wish. You don't have to ask me.

The Witness: I refuse to answer that question unless I am afforded the right to counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Are you and Mr. Percudani the only partners in that firm?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Is your place of business at 16 Court Street, Brooklyn?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless afforded the right of counsel.

Q. How many employees do you have in your business?

The Witness: I refuse to answer that question unless I [fol. 36] am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer it.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Does your firm Gotham Claims Bureau do work for attorneys?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Does your company do work for an attorney named I. Frank Miller?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I [fol. 37] am afforded the right of counsel.

Q. Has your firm done work for an attorney named David Goldner?

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

Q. Who is the attorney who represented you here this morning?

A. Anthony Zangara.

Q. And he is an attorney, is he?

A. Yes, sir.

Q. At 147 Montague Street, Brooklyn?

A. I believe that is the address.

Q. Have you or your firm done work for Mr. Zangara?

The Witness: I refuse to answer that question unless I have counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am accorded counsel.



**Q. Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?**

**The Witness:** I refuse to answer that question unless I [fol. 38] have the right of counsel present.

**The Court:** I direct you to answer.

**The Witness:** I refuse to answer that question unless I have the right of counsel present.

**Q. Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?**

**The Witness:** I refuse to answer that question unless I have the right of counsel present.

**The Court:** I direct you to answer it.

**The Witness:** I refuse to answer that question unless I have the right of counsel present.

**Q. Have you referred any cases to a lawyer named I. Frank Miller?**

**The Witness:** I refuse to answer that question unless I have the right of counsel present.

**The Court:** I direct you to answer the question.

**The Witness:** I refuse to answer that question unless I am afforded the right of counsel.

**Q. Have you referred any cases to a lawyer named David Goldner?**

**The Witness:** I refuse to answer that question unless I have the right of having counsel present.

**The Court:** I direct you to answer the question.

[fol. 39] **The Witness:** I refuse to answer that question unless I am afforded the right of counsel.

**A. Will you name the attorneys to whom you have referred cases, negligence cases?**

**The Witness:** I refuse to answer that question unless I have the right of counsel present.

**The Court:** I direct you to answer the question.

**The Witness:** I refuse to answer unless I am afforded the right of counsel.



Q. Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?

The Witness: I refuse to answer that question unless I have the right to have counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question unless I am afforded the right of counsel.

The Court: I think that is enough, Mr. Hurley.

Q. Mr. Bluestein, do I gather from what you are saying that no matter what questions I ask you from here on you would give the same answer, namely, that you refuse to answer unless you have the right of counsel in the room during your examination?

A. Yes, sir.

Q. That is the basis of your refusal to answer?

A. Yes, sir.

[fol. 40] Q. You are not basing your refusal to answer on any other ground?

A. At the present time, no.

Q. At the present time we are just talking about the present time, right?

A. That is right.

Q. No other reason for your refusal to answer at this time?

A. At this time, yes, sir.

The Court: All right, Mr. Bluestein, I hold you in contempt of court. Now you may go out with the court officer, and I will have you and your counsel come in here in a few minutes.

(Witness excused.)

(Mr. Zangara, Mr. Bluestein and Mr. Percudani enter the courtroom.)

The Court: Mr. Zangara, you are here now with your two clients.

Mr. Zangara: Yes, sir.

The Court: I have held both of them in contempt of court, and I direct you and them to be back here Thursday morning at 10:00 o'clock.

Mr. Zangara: Yes.

[fol. 40a] The Court: To show cause at that time, if you wish, as to why I should not punish them. Be here Thursday morning, this coming Thursday, which is the 24th, at 10:00 o'clock.

Mr. Zangara: Yes, your Honor.

The Court: You may go now, and I will let them go in your custody.

Mr. Zangara: Thank you very much, your Honor.

(Mr. Zangara, Mr. Bluestein and Mr. Percudani excused from the courtroom.)

[fol. 41]

IN THE MATTER OF THE PETITION OF THE BROOKLYN  
BAR ASSOCIATION FOR A JUDICIAL INQUIRY, ETC.

Brooklyn, N. Y., Thursday, April 24, 1958

(Anthony Zangara, Esq., entered the courtroom.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Good morning, Mr. Zangara.

Mr. Zangara: Good morning, Judge.

The Court: Who is it, Mr. Hurley, you want to take first?

Mr. Hurley: If your Honor please, this involves the matter of the Gotham Claims Bureau, Mr. Bluestein and Mr. Percudani, who were called here as witnesses on Tuesday of this week, April 22, and at the conclusion of the examination your Honor requested Mr. Zangara, the attorney for Mr. Bluestein and Mr. Percudani, to return here today, and you directed his two clients to be here this morning, "To show cause at that time, if you wish, as to why I should not punish them," and you directed them to be here this morning, Thursday, at ten o'clock.

The Court: All right.

Mr. Zangara, which client do you wish to have in first?

Mr. Zangara: If your Honor pleases, I would like to make a statement for the record.

The Court: Before either one of them comes in?

[fol. 42] Mr. Zangara: Well, if you would, I would like them to be present when I make the statement.

The Court: That is what I asked you. Which one do you want to bring in?

Mr. Zangara: I would like both of them to be in.

The Court: No, I will take one at a time. These are separate matters.

Mr. Zangara: Mr. Bluestein.

The Court: All right.

(Howard Bluestein entered the courtroom.)

The Court: All right, Mr. Zangara, Mr. Bluestein has arrived.

Mr. Zangara: With the permission of your Honor, I would like to make a statement for the record with reference to both my clients and myself: That both my clients have been threatened with criminal prosecution by members of your staff, that one of your Committee members, who calls himself Chief of Operations, Mr. Donlan, and an attorney-representing this Committee, in my presence, told my clients that they had enough evidence against them for a commission of a crime to make out a prima facie case before the Grand Jury and that they would be able to go to the District Attorney's office with that information. They had accused them of misrepresentation on certain facts, as well as other things.

[fol. 43] That I myself was intimidated by a member of your Committee. That this particular member advised me that maybe I should be investigated just on the strength that I was representing him as an attorney.

The Court: Who was that?

Mr. Zangara: That was Mr. Donlan. He said that to me on one occasion, and then on a separate occasion he said that to me in the presence of my clients: That the fact that I was associated with them and representing them here before this Committee that maybe I should be investigated as well.

Now, for the first time my clients advise me that they were asked questions on April 22 about their association with me.

The Court: By whom?

Mr. Zangara: By this Court.

The Court: You mean—

Mr. Zangara: By your Honor, any member of the Committee. They informed me; I wasn't present, but they informed me.

The Court: Yes, you weren't here. You said that your client advised you? Which client advised you?

Mr. Zangara: Mr. Percudani advised me that he was [fol. 44] asked specifically—

The Court: Let's take them one at a time. Mr. Bluestein is here. Let's confine ourselves to him. This that you are saying now doesn't apply to Mr. Bluestein's case.

Mr. Zangara: Well, it applies to his case as well, yes, Judge, because he was also—

The Court: You haven't said so.

Mr. Zangara: He was threatened as well. I said both my clients were.

The Court: Yes, but I mean this last thing you spoke about, about his being asked questions while here. Take them one at a time. In that way we don't confuse the issues.

#### MOTION TO PRODUCE MINUTES AND DENIAL THEREOF

Mr. Zangara: With your Honor's permission, we would like to have copies of the minutes of this hearing.

The Court: You move to that effect?

Mr. Zangara: I move to that effect. We are willing to pay for them.

The Court: I deny the motion, and that is likewise a matter you will find has been passed upon by the Appellate Division.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Zangara: On April 22 one of the Clerks of your Court performed an illegal search and seizure on Mr. Percudani. I will—

[fol. 45] The Court: Which Clerk of the Court?

Mr. Zangara: One of the Clerks of your Court.

The Court: Which Clerk was that?

Mr. Zangara: I think it was this gentleman right here (indicating).

The Court: He is a Court Officer. He is not a Clerk.  
Court Officer: Court Officer Michael Cantarsieri.

The Court: An illegal search and seizure?

Mr. Zangara: That is right, he took Mr. Percudani out in the corridor and proceeded to search him and asked him if he had a weapon on him. He also confined him to a particular section of the corridor and refused to allow me to speak to him until subsequently he left the corridor and came back and said I could speak to him.

The Court: This is all news to me. Everything that you have said so far—

Mr. Zangara: I understand that, Judge.

The Court: —is all news to me.

Mr. Zangara: I am making this statement for your information as well as for the record. He also asserted that Mr. Percudani was under arrest, and the Sheriff was coming over to arrest him.

Under this state of facts, we contend that this is not an [fol. 46] impartial inquiry.

The Court: I see.

Mr. Zangara: That it is essential that both my clients have the right of counsel present when they are being examined by your Honor.

The Court: I denied that, and as you know, that has been passed upon by the Appellate Division.

Mr. Zangara: Yes. Your Honor, that decision that was passed upon, M. Anonymous, was an entirely different state of facts than we have so far stated here. That that particular gentleman was called as a witness, in contradiction to my clients who have been informed they are prospective defendants.

The Court: Who informed them they were prospective defendants?

Mr. Zangara: Mr. Donlan and also an attorney on Mr. Hurley's staff.

The Court: As I recollect—

Mr. Zangara: In my presence.

The Court: As I recollect, I told them they were not defendants, that they were merely witnesses. I am very sure. If not, I will tell them now.

Mr. Zangara: These charges were made on a previous



date. They were made on or about December 4, 1957.  
[fol. 47] The Court: I see.

Mr. Zangara: Certainly it is with reference to my own knowledge about these facts. I am stating them as an Officer of this Court, that I myself was threatened by a member of your Committee, because I was representing them before the hearing.

With your Honor's permission, we contend that your Honor is without any power to hold the petitioners and this particular petitioner in contempt, that by the Order of the Appellate Division you were appointed to inquire into certain conduct of attorneys and others acting in concert, as I understand the Order to read, and that you are acting in a dual capacity as an inquisitor as well as a Judicial Officer.

Also, we are under the impression that this is not a judicial hearing, but a quasi administrative hearing, because the Court is holding its session in secret and is denying the right of counsel; that a Court when it sits never denies the right of counsel to any persons appearing before it, and does not hold secret hearings in any way, in any sense.

If your Honor please, I would like to make a statement. Would you bear with me?

The Court: I will give you all the time in the world, Mr. Zangara.

[fol. 48] Mr. Zangara: I ask your Honor to take judicial notice of the Civil Rights Law of the State of New York, Section 73, which sets up a code of fair procedure for investigative agencies.

Pursuant to that section, the Legislature, their branch of the Government, has recognized that it is the prime duty of any Government to safeguard the rights of its citizens at both public and private hearings. More particularly, the right to presence and advice of counsel is established by that section.

I ask the Court whether the judicial branch of the Government should provide less safeguards to the rights of its citizens when the judicial branch as guardians of the citizens—of the rights of the citizens—should serve as the destruction of these very rights.

Your Honor has specifically denied the witness, Mr. Bluestein, the right of counsel to be present while he is being examined. I think it is relevant to point out to the Court that in 1946 the Congress of the United States specifically required in the Administrative Procedure Act that "Any person compelled to appear in person before any agency or representatives thereof shall be afforded the right to be accompanied, represented, and advised by [fol. 49] counsel, or if permitted by the agency, by other qualified representative," and I quote that from that section.

That further, the Senate Judiciary Committee declared that "By enacting this bill, the Congress, expressing the will of the people, will have laid down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure."

The Honorable Mr. Justice Hugo L. Black stated in a Supreme Court decision that an administrative agency conducting an investigation cannot validly compel a witness to appear before it and testify in secret without the assistance of counsel.

With all due respect to your Honor, I feel that this proceeding violates the protection guaranteed every person under the due process clause of the Fourteenth Amendment, that to compel a person to appear alone before your Honor and give testimony in secret, against his will, is a violation of the due process clause.

The conduct of this inquiry is contrary to our nation's historic distrust of secret proceedings, and it is contradictory to the principles laid down by the highest court of this land.

[fol. 50] In the Powell case, one of the Scottsboro cases, the Court said that an accused requires the guiding hand of counsel at every step in the proceeding against him.

A secret examination such as is being conducted here is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation. The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version

frequently may reflect an inaccurate understanding of an accused's statement, or on occasion may be deliberately distorted or falsified. While the accused may protest against this misrepresentation, his protestations will normally be in vain. The presence of legal counsel insures adequate protection to a witness. Behind closed doors he can be coerced, tricked, or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions.

While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will. Nothing could be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyers. A witness charged with com-[fol. 51] mitting contempt during a secret interrogation faces the gravest handicaps in defending against this charge. When the witness is deprived of the advice of counsel, he may be completely unaware that his conduct has crossed the obscure boundary and become contemptuous.

It may very well be that this type of interrogation would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned could be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. The right to use counsel at a formal trial is a very hollow thing indeed when, for all practical purposes, the conviction is already insured by pre-trial examination.

It has been said that a witness could protect himself against some of the many abuses possible in the secret interrogation by asserting the privilege against self-incrimination. This proposition collapses under anything more than the most superficial consideration. The average witness has little, if any, idea when or how to raise any of his constitutional privileges. And in view of the intricate [fol. 52] possibility of waiver, which surrounds the privilege, he may easily unwillingly waive.

If the witness is coerced or misled by his interrogators, he may not dare to raise the privilege. He is made con-

stantly aware that hanging over his head at all times is the Court's power to punish him for contempt, a power whose limitations with witness will not understand.

There has been a statement made by a member of the Committee that this—

The Court: Who is the member of the Committee?

Mr. Zangara: Mr. Donlan made a statement to Judge Canudo of the Bar Association.

The Court: To Judge who?

Mr. Zangara: Judge Canudo, former Judge Canudo, of the Brooklyn Bar Association.

The Court: I don't know the gentleman? Canudo?

Mr. Zangara: Excuse me, your Honor?

The Court: Judge Canudo? I don't know him.

Mr. Hurley: If your Honor pleases, I think counsel is referring to former Magistrate Eugene Canudo.

Mr. Zangara: That is it.

Mr. Hurley: Who is now, I think, if I recall the facts, Chairman of the Civil Rights Committee of the Brooklyn Bar Association, and I think it was suggested by somebody [fol. 53] in the Bar Association, the President or somebody, that he should look into some situations here, and he came over and interviewed Mr. Donlan in that capacity, as Chairman of the Civil Rights Committee of the Brooklyn Bar Association.

Mr. Zangara: As I understand it, at that interview Mr. Donlan asserted that this Committee is acting as a Grand Jury.

The Court: I don't know anything about it. That isn't so, anyway.

Mr. Zangara: I thought you might probably not know about that, Judge.

Now, with reference to that particular aspect, reliance may be placed on the practice of examining witnesses before a Grand Jury in secret without the presence of witnesses' counsel, associated with his statement that this was a Grand Jury.

On the surface, any support the Grand Jury practice may lend disappears upon analysis of that institution. The Grand Jurors have no axes to grind, and are not charged presently with the administration of the law. No



one of them is a prosecuting attorney or law enforcement officer, ferreting out crime. Similarly the presence of the jurors offers a substantial safeguard against the abuse or deception of a witness, and against misrepresentation, in- [fol. 54] tentional or otherwise, of the witness's statements and conduct before the Grand Jury.

I reiterate, Judge, the fact that members of this Committee have advised my clients that they have a prima facie case against them for the commission of a crime sufficient to present to the Grand Jury and to the District Attorney, that this interrogation of my clients is intended to be an important and integral part of the prosecution against them.

The rights of my clients who are being examined in connection with these supposed crimes should not be destroyed merely because this Inquiry is given the euphonious label of investigatory and advisory. If, however—

The Court: You say it is phony? You said—

Mr. Zangara: Euphonious.

The Court: Euphonious.

Mr. Zangara: Euphonious. Relating to a nicer sounding term.

The Court: I wanted to get the word right.

Mr. Hurley: I think he is reverting to the Greek, your Honor, euphonious.

The Court: Yes, I studied it for five years.

Mr. Zangara: It is a word that I have seldom been able [fol. 55] to use before. If, however, as the Court contends that my clients are here merely as a witness, then there should not be the slightest objection to their right to be protected to the fullest extent, namely, by the presence of counsel during their interrogation.

True, that while it may be in the public interest to conduct such an inquiry as this, it is also paramount in that same public interest that the rights of my clients and all other persons appearing here should be protected rather than destroyed.

The Court: That is rather a conclusion on your part, not based upon fact, isn't it, "rather than destroyed"?

Mr. Zangara: No, it is not based on fact, Judge—in a sense it is based on fact. Your Honor has refused the right of counsel.



**The Court:** I disagree with you as to what your conclusion is.

**Mr. Zangara:** If your Honor please, our system of law is accusatory as opposed to an inquisitory system. Such has been the characteristic of Anglo-American criminal justice, since it freed itself from practices barred by the star chamber, whereby an accused was interrogated in secret for hours on end.

[fol. 56] Under our system society carries the burden of proving its charges against the accused, and not to do so out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards.

**The Court:** Nobody is accused here of anything.

**Mr. Zangara:** Judge, that is contrary to the facts.

**The Court:** Mr. Bluestein, as I have told you and told him, is called here as a witness.

**Mr. Zangara:** I would be happy, if your Honor please, if you would conduct a hearing on those particular charges. These statements were made to my clients in my presence.

**The Court:** Have you anything else to say? I am getting a little impatient.

**Mr. Zangara:** May I finish what I have to say?

**The Court:** Yes, surely. How do we conduct hearings without witnesses? Go ahead.

**Mr. Zangara:** I am not arguing that point, your Honor. I am not arguing that point at all.

**The Court:** I am arguing it. Go right ahead.

**Mr. Zangara:** Secret inquisitions are dangerous things, feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often [fol. 57] the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the State and whisked away for secret interrogation or worse, unless the groundwork has been securely laid for their inevitable conviction.

While the labels applying to this practice are frequently changed, the central idea, wherever and whenever carried out, remains unchanging, extraction of statements by one means or another from an individual by force of the State while he is held incommunicado.

I reiterate my belief that it violates the due process clause of the constitution to compel a person to answer questions at a secret interrogation when he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by government officials. Such procedures are a grave threat to the liberties of a free people.

If your Honor pleases, I also have cases with reference to an administrative agency conducting an investigation.

The Court: We are not an administrative agency. This is a court.

Mr. Zangara: We contend that it is a quasi administrative agency.

The Court: I know you do, but I say that is not a correct contention, and I so rule.

Mr. Zangara: That is all I have to say at this time, if your Honor please. One other point I would like to make, that the objections and statement I have made I would like to be made in conformity with your holding of my other client, Mr. Percudani.

The Court: We will come to that at the proper time.

Let me say first, in regard to your remarks, you say this witness has been threatened by a member of the staff. I know nothing about it. I will inquire into it. We don't permit any such thing, and I have very serious doubt as to whether anything like that happened, as you claim. You say that you were intimidated. That has nothing to do with anything before me here now. We will look into that, however.

In regard to what you say the officer did, I don't know anything about it, but I assume that he did what he was supposed to do within the scope of his duties, and that he has done it correctly and properly. But I will inquire into that also.

All of those things, however, are extraneous to the matter before me now. Let me inform Mr. Bluestein—he is right [fol. 59] here—inform you again, if it is necessary, Mr. Bluestein is called here as a witness merely. He is not a defendant, he is not a respondent, he is merely a witness, to testify in this proceeding. He is under no compulsion here except that given by law to answer questions, proper

questions that are asked him. He has been given every opportunity to answer those questions, he has been given every opportunity to consult with you, and you were here last time, you were outside. We are going to put him back on the stand again. I am going to ask him the same questions. He may, if he wishes, make the same answers, whatever he wishes to do. That is up to him. We will give him the same opportunity to go out and consult you if you wish to do it.

With that explanation, I will ask if there is anything else you want to say at this time? We intend to put Mr. Bluestein back on the stand and ask him these questions again.

Mr. Zangara: I would like to know your Honor's position with reference to your direction that I return this morning and present my clients before you, show cause why they should not be punished for contempt. Are they being held in contempt?

The Court: Yes. You have been speaking on that point [fol. 60] now, I assume.

Mr. Zangara: Yes, sir, but now you say you want to put them back on the stand.

The Court: That is right, I will give you a further opportunity, and you may wait outside. We will call him and put him on the stand.

Mr. Zangara: One other matter, Judge: You mentioned the fact of intimidation or threats to my clients as well as myself.

The Court: I didn't mention them, you mentioned them. I only mentioned them because you did.

Mr. Zangara: You mentioned them again in reference to my first statement.

The Court: Don't think that I mentioned them first. I didn't.

Mr. Zangara: No, I know you didn't. If your Honor, in his discretion, decides to investigate it, myself and my clients are prepared to take the stand and testify to every one of these items.

The Court: All right. Thank you very much for your offer. I will keep it in mind. You may retire now. If you will wait outside. Your client may want to ask you some questions or may not, I don't know.

Mr. Zangara: May I speak to him for a minute?  
[fol. 60a] The Court: Certainly you may.

(Mr. Zangara and Mr. Bluestein retired from the courtroom.)

[fol. 61] HOWARD BLUESTEIN, having been previously duly sworn, was recalled and testified further as follows:

Examination by Mr. Hurley:

Q. Mr. Bluestein, you were examined in this courtroom on Tuesday, April 22nd, by me, and I asked you certain questions and you gave certain answers. I am now going to repeat in the exact words some of the questions that were asked you at that time, and I am going to ask you to answer these questions.

The first question is: In the Gotham Claims Bureau, is your partner Neal Percudani?

The Witness: I refuse to answer any question unless I have a right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.

Q. Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the county clerk's office?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any question unless I [fol. 62] have the right of counsel present.

Q. Are you and Mr. Percudani the only partners in that firm?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.



Q. Is your place of business at 16 Court Street, Brooklyn?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any question unless I have the right of counsel present.

Q. How many employees do you have in your business?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.

Q. Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?

The Witness: I refuse to answer any questions unless [fol. 63] I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.

Q. Does your firm, Gotham Claims Bureau, do work for attorneys?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.

Q. Does your company do work for an attorney named I. Frank Miller?

The Witness: I refuse to answer any questions unless I have the right of counsel present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel present.

Q. Has your firm done work for an attorney named David Goldner?



The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless [fol. 64] I have the right of counsel to be present.

Q. Have you or your firm done work for Mr. Zangara?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Q. Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: May I say, if you wish at any time to consult counsel, you are free to do so after the question is asked, or after I direct you, whichever you want to do.

Q. Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

[fol. 65] The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Q. Have you referred any cases to a lawyer named I. Frank Miller?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Q. Have you referred any cases to a lawyer named David Goldner?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Q. Will you name the attorneys to whom you have referred cases, negligence cases?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

[fol. 66] The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Q. Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

The Court: I direct you to answer the question.

The Witness: I refuse to answer any questions unless I have the right of counsel to be present.

Mr. Hurley: I have no further questions, your Honor.

The Court: All right. I hold you in contempt of court. The officer will hold you until we finish with the other witness.

Ask counsel to come in for a minute. You may stay here, Mr. Bluestein. I want you to be present while your lawyer is here.

(Mr. Zangara enters the courtroom.)

#### COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Zangara, I merely want to inform you of what has occurred generally so that you will be apprised of what has been done. Mr. Bluestein has been called to the stand again and been asked some of the questions that he

was asked before by Mr. Hurley, and he has refused to answer [fol. 67] for reasons that he has given.

I directed him to answer. I have held him in contempt of court. I haven't said what I am going to do as a result of the contempt, but in the meantime we will take the other witness and Mr. Bluestein will stay here in custody of the court officer outside.

We will have to wait until the air raid sirens stop blowing. We will take a short recess.

(Witness excused)

(A brief recess was taken.)

(Mr. Zangara is now present in the courtroom with Mr. Percudani.)

The Court: Mr. Percudani is now present with Mr. Zangara.

Mr. Zangara, you said before with regard to the remarks you made when Mr. Bluestein was here that you wanted those remarks to be applicable to Mr. Percudani. That will be done.

Mr. Zangara: With the same force and effect.

The Court: Yes.

Mr. Zangara: Thank you very much.

The Court: Is there anything else you wish to say or add to it?

Mr. Zangara: I don't want to complicate matters, but your Honor has mentioned already that you were not aware [fol. 68] of what some of the members of this committee have been doing. This gentleman, with all good intentions—

The Court: Give me the name.

Mr. Zangara: The court officer.

The Court Officer: Michael Santarsieri.

Mr. Zangara: The court officer took Mr. Bluestein out in the corridor and said in a loud voice that, "We are making money today, we are holding people in contempt." He is very incensed about that. He wanted me to mention that to you. These are secret hearings.

The Court: I will take that up in a little while. The immediate matter is Mr. Percudani, and I want to advise

him and you, if it is necessary again, that he is here merely as a witness, not as a defendant, not as a respondent. You understand what I am talking about. You can explain that to him. You understand Mr. Percudani, you are not here as a defendant; do you hear me?

Mr. Percudani: Yes, sir, I do.

The Court: You understand you are not here as a defendant. You are merely here as a witness. We are going to ask him some of the questions that were asked before [fol. 69] and if he wishes to consult you, we will give him every opportunity to do so at any time during the questioning or any time that I direct.

Mr. Zangara, if you will retire from the courtroom we will call Mr. Percudani to the stand.

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NEAL PERCUDANI, having been previously duly sworn, was recalled and testified further as follows:

Examination by Mr. Hurley:

Q. Mr. Percudani, on Tuesday, April 22nd, 1958, just two days ago, you were examined in this courtroom and you were asked certain questions. I am now going to repeat some of those questions exactly as they were put to you on Tuesday and ask you to answer the questions.

Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau, located in Brooklyn, New York?

The Witness: Being denied the right of counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: I refuse, sir.

The Court: For the same reason? You have to give [fol. 70] the reason.

The Witness: The fact that I am not represented by counsel at this hearing.

Q. Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—

The Witness: Being denied the right of counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Do you want me to repeat that again, sir?

The Court: Yes, if that is what you wish to do.

The Witness: If it is necessary, sir, I will do it. If you request it.

The Court: An answer is required when I direct you to answer. You may explain why you don't want to do it and it will be put on the record.

The Witness: Being denied the right of counsel, I refuse to answer that question.

Q. In connection with Gotham Claims Bureau, Mr. Percudani, will you tell this Court what attorneys you do investigating work for?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

[fol. 71] The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you and Mr. Bluestein?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing—I am getting confused. Being denied counsel at this hearing, I refuse to answer that question.

Q. Mr. Percudani, did you work, in connection with your business, the Gotham Claims Bureau, for an attorney named E. Frank Miller at any time?



[fol. 72] The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Mr. Percudani, did you, in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being refused counsel at this hearing, I refuse to answer that question.

Q. Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer that question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Mr. Percudani, how old are you, sir?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

[fol. 73] The Court: I direct you to answer that question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Where do you live now, Mr. Percudani?

The Witness: Being denied counsel for this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel for this hearing, I refuse to answer that question.

Q. Mr. Percudani, were you born in 1903?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Are you married, Mr. Percudani?

The Witness: Being denied counsel at this hearing, I [fol. 74] refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Let me ask you this: Is the Gotham Claims Agency a trade name?

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Are you and Mr. Bluestein the only partners in that concern?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

Q. Are your offices at 16 Court Street, Brooklyn, New York, sir?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

[fol. 75] Q. Is the principal work of the Gotham Claims Bureau investigating cases for attorneys?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

Q. Have you personally, Mr. Percudani, referred any cases to attorneys?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

Q. Have you done any investigating work for an attorney named David Goldner?

The Witness: Being denied counsel, I refuse to answer the question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

Q. Have you referred a number of cases to Mr. Goldner?

The Witness: Being denied counsel, I refuse to answer [fol. 76] that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

Q. Have you produced today, Mr. Percudani, your financial records?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel at this hearing, I refuse to answer that question.

Q. Have you produced your records, reports, statements, bills pertaining to any and all investigations or business

of any nature for or concerning I. Frank Miller, Attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?

The Witness: Being denied counsel, I refuse to answer that question.

The Court: I direct you to answer the question.

The Witness: Being denied counsel, I refuse to answer that question.

[fol. 77] Q. Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?

The Witness: I refuse to answer that question being that my attorney is not present at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question on the grounds that my attorney is not present at this hearing.

Q. Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?

The Witness: I refuse to answer that question on the grounds of my attorney not being present at this hearing.

The Court: I direct you to answer the question.

The Witness: I refuse to answer that question on the ground that my attorney is not present at this hearing.

Mr. Hurley: I have no further questions, your Honor.

The Court: I hold you in contempt of court, Mr. Neal Percudani. I will turn you over to the court officer at the present time. You may step down and stay here.

Ask Mr. Zangara to come in.

[fol. 78] (Mr. Zangara enters the courtroom.)

#### COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Zangara, I wish to inform you in regard to Mr. Percudani, the same as I informed you with regard to Mr. Bluestein, that he was put on the stand, he was asked certain of the questions that he was asked the other day and he has given his answers to them and I made directions

that he answer the questions asked, and he has given reasons why he doesn't want to answer in regard to those directions.

I want to bring you up to date on it so you know what occurred. I have held him in contempt of court. Temporarily I am turning him over to the court officer to be held.

Mr. Hurley, will you prepare such of the papers as you can and then I will make up my mind just what the punishment will be, if any, that I intend to mete out here.

That is all, unless you want to say anything further at this time in regard to this matter.

Mr. Zangara: Yes, I would appreciate it if your Honor would serve us with a copy of the papers.

The Court: You will be here. You will get a copy of the papers.

[fol. 79] Mr. Zangara: I would also request that your Honor release Mr. Bluestein and Mr. Percudani in my custody.

The Court: No, I shall not do that, not at the present time.

You made certain statements—I assume you call them charges—against the staff, Mr. Donlan in particular. You stated that your clients had been intimidated and you said they were threatened—I think is the word you used.

Mr. Zangara: Absolutely.

The Court: That you had been intimidated and then you made a certain charge against the court officer.

Mr. Zangara: That is true.

The Court: You are an officer of this court. I am going to hear you on those right now.

Mr. Donlan has been away ill, but he came in a short time ago. Mr. Percudani can step outside.

(Mr. Percudani leaves the courtroom.)

Mr. Zangara: If your Honor pleases, are you going to conduct a hearing into those charges?

The Court: I don't know about a hearing. I am going to hear what you have to say and I will take it under oath, because this is very important. So if you wish to, will you [fol. 80] take the stand and you may give me, under oath, what you say occurred to you, at least, that is, what you



know about it firsthand. Then I will ask your clients similarly to come in and tell me what they know about it.

Then I will hear the members of the staff and the court officer.

Mr. Zangara: On one point, your Honor. This particular inquiry, with reference to the charges, is solely with reference to the charges? Am I to understand that? Only with regard to statements I have made on the record with reference to Mr. Donlan and another member of the staff, an attorney with Mr. Hurley?

The Court: I will hear whatever you wish to say.

Mr. Hurley: Who is the other member of the staff?

Mr. Zangara: I saw him outside before. He was there on December 4, 1957.

(Mr. Giustiniani enters the courtroom.)

The Court: Mr. Giustiniani, you weren't here in the courtroom. Mr. Zangara made some statements with regard to the treatment of Mr. Bluestein and Mr. Percudani, whom he said were interrogated here.

[fol. 81] He referred by name to Mr. Donlan and he also referred to the court officer. As far as we can understand, he includes you.

Is this the gentleman, Mr. Zangara, that you referred to?

Mr. Zangara: Yes, your Honor. I spoke to him on December 4, 1957.

If your Honor please, may I ask you one question with reference to releasing Mr. Bluestein and Mr. Percudani in my custody. You denied that. Would your Honor fix bail for them and admit them to bail?

The Court: I won't fix bail. That is not punishment for contempt. What I will do, I will decide a little later. I haven't decided quite yet just what I am going to do.

(A brief recess was taken.)

[fol. 82] The Court: All right, Mr. Zangara.

Mr. Zangara: With one respect, Judge, this is only with reference to the charges, is that correct?

The Court: That is correct.

ANTHONY ZANGARA, 110 New York Avenue, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

The Witness: May I make a statement?

The Court: By all means. You made the statement. Now if you want to back it up by some facts we will be glad to take it.

The Witness: I am an attorney, admitted to practice in June of 1951. I maintain my office at 147 Montague Street, Borough of Brooklyn.

On December 4, 1957, I had occasion to be before this Inquiry with—

The Court: Well now, will you make that plain, whether you mean in the courtroom or whether you mean somewhere else.

The Witness: Before the Inquiry in the courtroom and outside, pursuant to subpoena served on Howard Bluestein and Neal Percudani. I appeared for them as their counsel.

On that occasion Mr. Donlan called me into his office for [fol. 83] an off the record discussion. He asked me about the Gotham Claims Bureau, which Mr. Percudani and Mr. Bluestein operate their business. And he made reference to, that they were involved with lawyers and that they were to be called as witnesses before this Inquiry.

At that time he also asked me in what way I was associated with Mr. Percudani and Mr. Bluestein, and he told me that because of that association and because I was down there before this Inquiry as their attorney that maybe I should be investigated as well.

I did not reply to that intimidation. I felt that I should not make a reply to such a statement.

Subsequently Mr. Donlan repeated his intimidations before my clients.

The Court: You mean he made the same statement with regard to you?

The Witness: A similar statement with regard to my representing them as counsel, that maybe I should be investigated by the committee and that I probably would be investigated by the committee.

Now, on December 4, 1957, we appeared before your Honor and asked for time with regard to those subpoenas [fol. 84] served on my clients. Your Honor graciously gave us time, pending the outcome of certain decisions. On that occasion Mr. Giustiniani was present and as we left the courtroom, out in the corridor, I asked him exactly what they were looking for in this matter with reference to my clients.

And in the presence of my clients he told me that they had enough evidence against Bluestein and Percudani to bring to the district attorney's office and the Grand Jury, they could make out a prima facie case against them for a crime. And I believe Mr. Donlan was present at that time as well.

On that occasion he told us that they wished to examine their books and records and question them about association with various attorneys. And that if in the process of the inquiry that any facts came out that would be against the interests of Mr. Bluestein and Mr. Percudani, then they would go against them as well, meaning in a criminal way.

That is all, your Honor.

The Court: Do you wish to ask any questions?

Mr. Donlan: Me, your Honor?

The Court: You are involved.

Mr. Hurley: I would just like to ask, if I may be permitted your Honor—

[fol. 85] The Court: Yes.

Mr. Hurley: Just ask Mr. Zangara this question.

By Mr. Hurley:

Q. What you have said here now, Mr. Zangara, is what constitutes in your opinion the threats and intimidations that you spoke of previously?

A. Yes, sir.

Q. When you addressed the Court?

A. That is correct.

Q. That is precisely it, is it?

A. Except for what my clients themselves may say with regard to these intimidations.

Q. But this is what you know?

A. What I remember, that is right.

Q. And this is what you call the threats and intimidation?

A. That is right.

Q. That is complete?

A. As far as I remember, yes.

Q. Nothing to add to it?

A. Nothing to add to it as far as I can remember.

Q. Nothing more than what you have said here this morning?

A. Yes, sir.

Mr. Hurley: Nothing else.

[fol. 86] Mr. Donlan: Your Honor, I have nothing.

The Court: Do you wish to ask the witness any questions?

Mr. Donlan: Well—

The Court: I will have you on the stand in a few minutes.

Mr. Donlan: I will be glad to state everything for the record that I recall.

The Court: I will call you as a witness, too.

Mr. Giustiniani, do you want to ask any questions?

Mr. Giustiniani: No. I differ with the witness as to what was stated.

The Court: I will give you an opportunity.

By the Court:

Q. Then that is all you know about it?

A. Yes, your Honor.

Q. The remainder of it was hearsay, what you said, your clients—

A. Only on that one occasion. I was out in the hall when Mr. Giustiniani spoke to me.

Mr. Donlan: I would like to make one thing clear. From the witness's recollection, I am not too clear on days here. Is it the testimony of the witness that this happened or these things happened on one day?

[fol. 87] The Witness: On December 4, 1957.

By Mr. Donlan:

Q. On the same day? I wasn't too clear on that. I think you were here before December 4th, weren't you?

A. No. November 21—

Q. What was that, did you appear on that date?

A. I think I called for an adjournment and I got an adjournment over the phone.

Q. You called?

A. I think so.

Q. I knew there was an earlier date, but I wasn't positive. I don't remember the exact dates.

The Court: All right.

Mr. Giustiniani: Just one question, your Honor.

By Mr. Giustiniani:

Q. Mr. Zangara, were you ever, prior to this time, in the office relative to some other matter?

A. Never.

Q. In connection with the attorney Maxwell Leibowitz? Was there a claimant who was subsequently represented by you and did you come in the office relative to that matter?

The Witness: Well now, your Honor—

Mr. Giustiniani: I was trying to clear up a point for Mr. Donlan.

[fol. 88] The Court: I don't want to go outside of what we are going into. We will never get through if we do.

Mr. Hurley: I think it has been made clear, Mr. Zangara, that everything that you have related—

The Witness: I will state for the record I have never been in the committee office for any other purpose but to be a representative of Mr. Bluestein and Mr. Percudani.

By Mr. Hurley:

Q. And it is clear now from what you said that everything that you have related, everything was said on that one day and your recollection is that was December 4, 1957?

A. That is the best of my recollection, it was December 4, 1957.

Q. That is the only day there was any such talk?

A. That is the only day I believe I was in. Maybe November 21 we were here, but I am not sure of that day. I am



almost positive. In fact, I am as positive as I can be on my recollection now that it was December 4th when the statements were made by Mr. Giustiniani and by Mr. Donlan.

Mr. Hurley: Thank you.

[fol. 89] The Court: Mr. Donlan, do you want to give your version of what occurred?

Mr. Donlan: Yes.

Mr. Zangara: Will you ask my clients to come in?

The Court: Well, not at this point.

The Witness: It concerns them.

The Court: Well, it may concern them, but not at this point.

You may stay here, Mr. Zangara.

Mr. Zangara: All right.

The Court: Mr. Donlan has been sworn before, but we will swear him again.

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THOMAS J. DONLAN, 9902 Third Avenue, Brooklyn 9, New York, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. You heard what Mr. Zangara said, Mr. Donlan. Will you give us, please, your version?

A. Yes, your Honor. I recall Mr. Zangara coming into the office, and I might state that the reason he was asked in was that I had been advised by the man at the desk, the attendant, that the two witnesses were here as re-[fol. 90] quested, and that they were represented by an attorney, and that the attorney was Mr. Zangara. That was the reason I called Mr. Zangara in. My practice is that if a witness is represented by an attorney, I ask the attorney to come in.

Now, when he came in I spoke to him. I don't recall the exact details. I spoke to him briefly about what we might question the witnesses about. My recollection is that I told him that they had, to our knowledge—we had evidence to show that—had worked for certain attorneys, that there was some evidence in our files which indicated

that their actions seemed improper, and that we were going to question them relative to those things.

Somewhere in the conversation it came up that in addition to the work, that we had known these particulars, this firm, did work for insurance companies outside the State of New York. And when that came up I asked Mr. Zangara about it, and Mr. Zangara—I asked him what kind of work it was, and so forth, and as I recall it, it involved settling cases and so forth for out-of-state insurance companies.

I raised the point at that time as to the propriety of two—not lawyers—or a firm, such as theirs, handling legal matters for insurance companies outside the State, and from what I remember of it, they contracted to do this [fol. 91] work.

“How could they do the work?”

He said, “I do the legal work for them.”

I said, “In view of that, we may very well have to call you in and question you relative to your position with this company and your actions in regard to this legal work.”

Now, in general, that is my best recollection of my particular meeting with Mr. Zangara, and the other two. I think that states it succinctly and substantially.

The Court: Do you wish to ask Mr. Donlan any questions, Mr. Zangara?

Mr. Zangara: No, your Honor.

The Court: All right.

Mr. Donlan: I would like to state, your Honor, as I have stated before, that I never said to Mr. Zangara that it was because he represented these two witnesses, Percudani and Bluestein, in reference to this particular thing. It was not because of that. It was because of this out-of-State situation that had come up through Mr. Zangara.

The Court: All right.

(Witness excused.)

The Court: Mr. Giustiniani.

[fol. 92] WILLIAM A. GIUSTINIANI, 68 East 235th Street, New York 70, New York, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. You heard what was said. Do you wish to say anything?

A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the outer-foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from defendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was [fol. 93] relative to this that we wished to speak to them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

[fol. 94] In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done.

The Court: All right. Any questions?

Mr. Zangara: No, your Honor.

The Court: All right, do you want to bring in Mr. Bluestein? I will hear what he has to say.

HOWARD BLUESTEIN, 5413 Kings Highway, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

The Court: Mr. Bluestein, this has nothing to do with the investigation, and what I am reporting, except it has to do with alleged conduct of the staff.

Now, I am allowing your attorney to stay here for this portion of this, which has nothing to do with the real investigation, in the actual sense.

Your counsel made certain statements, on representing you—I think it was when you were here, that you had been threatened with criminal prosecution or, you had other complaints against the staff.

Now I will be very glad to hear what you have to say in regard to that.

[fol. 95] The Witness: I think it was December 4th, your Honor—I am not quite sure—we were called into Mr. Donlan's room, and Mr. Donlan stated—I believe Mr. Zangara was present and my partner Neal Percudani—I can't quote the exact words, but it was words to this effect: That they had enough evidence on us for a prima facie case, and

they can take it to the district attorney and to the Grand Jury. That was before we left this building.

Once after that we were outside this door, and I don't recall if Mr. Donlan was there or not—I don't know this gentleman's name—

Mr. Hurley: Mr. Giustiniani, for the record.

The Court: Mr. Giustiniani.

The Witness: I don't recall—

The Court: Is that the gentleman you are pointing to?

The Witness: Yes, sir. He mentioned that they have enough on us for a prima facie case and they could take us to the district attorney and Grand Jury.

Now, as I say again for the record, I can't recall if Mr. Donlan was there at that time.

By the Court:

Q. That is all you know about it?

[fol. 96] A. Yes, sir.

Q. Nothing else. While you are here, did you make any statement regarding the officer?

A. Yes, sir. After you—

The Court: Just for the record, the court officer's name.

The Court Officer: Michael Santarsieri.

The Court: All right.

By the Court:

Q. I will hear you on that, too.

A. Well, your Honor, if I might just deviate a little bit, I am under the impression these are secret hearings, to avoid embarrassment to anyone that comes up here, to the attorneys, etc.

Now, there are people outside sitting in that room, on the right side of the fence—I don't know them, maybe they know me, I have no idea—I don't think it should be their concern why I am here. Now, when you told me to leave, this gentleman here walked out and did this—I don't know how you can describe it on your machine there—he went like this (indicating) and said "Money in the bank. We got one. He is held in contempt." And there were five



people that looked in my direction. And I don't think that is right. And I realize I am under oath right now.

[fol. 97] The Court: All right. Now, do you want to bring in Mr. Percudani. You may stay here.

Mr. Zangara: May I ask the witness one question?

The Court: Yes.

By Mr. Zangara:

Q. Do you recall at any time conversation with Mr. Donlan that he made any type of intimidation against me?

A. Yes. That was the time when you were in Mr. Donlan's room. I believe he stated that "being you are so closely associated with these boys, we ought to start investigating you," or words to that effect.

The Court: All right.

Mr. Hurley: May I just clear one thing up, your Honor?

The Court: Yes.

By Mr. Hurley:

Q. This incident about the court officer you say took place this morning after you had been excused and you went outside?

A. Yes, sir. Just about 60 seconds after I was excused by the Judge.

Q. You say there were people sitting out there?

A. Yes.

[fol. 98] Q. Was there anybody there that you do know?

A. I don't know. I don't know. Because I will be very honest with you, Mr. Hurley, at the present time I am nervous, and I am upset. There is no two ways about it. Because a hearing such as this can do that to anybody.

Q. Well, let me ask you this: Was Mr. Percudani out there at the time?

A. No, I was out there alone.

Q. He was in the courtroom at the time?

A. I believe so.

Q. Was there another court officer out there at the time?

A. The other court officer was opposite the water cooler, and this gentleman told him, just as I told you before

(indicating hands) "Money in the bank. We have a live one here. He is held for contempt." You can laugh all you want, that is what you said, and I will take an oath on it ten times.

The Court: I will hear him.

Q. Other than these two court officers, there was nobody else out there that you know or you recognized, is that right?

A. I don't know whether I know them or whether I recognize them, no, Mr. Hurley.

[fol. 99] Q. They are the only two people you can particularly identify?

A. Well, no, if I go out there now and these people are still there, I can point them out. One was a girl, she was wearing a black coat and I believe she had glasses on. She was sitting next to a gentleman about 5 feet 11½ inches tall, with a gray lumber jacket, weighed about 165 pounds.

Q. Can you fix the time of this?

A. No.

Q. I mean, how long ago was it?

A. I couldn't fix a time, but if the Court could fix a time as to when I was told to leave, then it is about a minute or two later.

Q. You were in and out a number of times, several times.

A. No, I was out—this was after the Judge told me that I am held in contempt, "please step out."

Q. At that particular point?

A. That is right.

By the Court:

Q. You remember some siren whistles blown at 11:00 o'clock. Can you fix it by that time?

A. Your Honor, I heard sirens, I heard whistles, but I [fol. 100] have no idea what time they were, where they came from or what they were.

The Court: All right. Now bring in Mr. Peréudani. We will hear what he has to say.

The Witness: May I step down?

The Court: Surely. You may stay right here, too.

(Witness excused.)

The Court: Do you want to come up, Mr. Percudani, and take the witness stand?

NEAL PERCUDANI, 1489 Lake Shore Drive, Massapequa Park, Long Island, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. This is in regard to the statement that was made by your attorney, and in regard to some treatment, alleged treatment that you received. Mr. Donlan I think, possibly Mr. Giustiniani. Is that the gentleman you referred to?

A. That gentleman here, yes, sir. On two separate—

Q. I will be very glad to hear you. Tell us all you want.

A. Do you want me to start, sir?

Q. Yes, in regard to those matters only.

A. All right, sir.

[fol. 101] To the best of my recollection, the first day, which I don't recall exactly what day we were up here, we entered Mr. Donlan's office, and he made some questions—I don't recall exactly what they were—why he wanted us and our books at that particular time. If I recall correctly, as we were leaving, while we were outside his office, where the stanchion is, where the banister is, he mentioned something to the effect that, well, he said—apparently I believe now Mr. Zangara had mentioned why we were wanted there, and he had mentioned that "Well, we have something on these boys." He didn't go further than—he said, "We have enough on these boys." And at that particular time I recall he asked Mr. Zangara, "How are you associated with these fellows?" And Mr. Zangara had told him how he is associated with us, and he in return said, "Well, maybe you may need investigation as well as them." That is as far as I recall. To that effect, sir,

Q. All right.

A. And on the other occasion, on the second day we were here, this gentleman here—

Q. Referring to Mr. Giustiniani?

A. I don't know his name.

Q. Mr. Giustiniani.

[fol. 102] A. Mr. Giustiniani. We were outside the door, and Mr. Zangara once again questioned him. He said,

"Look, what is the purpose why are these men here?" At that particular time he says, "Look, we have enough on them, we also have enough for a prima facie case to take them to the D. A.'s office. If they will cooperate—we of course, don't guarantee them anything—but we will go light on them." Words to that effect, your Honor.

Q. That is all in regard to those two matters?

A. Yes, sir.

Q. What about the court officers?

A. Oh, yes, sir. As I was leaving yesterday, this gentleman here—I don't know——

The Court Officer: Michael Santarsieri.

A. (continuing) Mr. Michael Santarsieri, as I was leaving the court, as I just stepped out the door, he started frisking me from behind.

Q. This is after I said you were in contempt of court?

A. Sir, to be perfectly frank, I was quite confused. I assume that is what you may have said, sir. I assumed that. As I left the court in the corridor, from the people—he started frisking me. I said, "What are you doing?" He said, "Don't you know? You are in contempt. You are [fol. 103] under arrest." He said, "You are actually under arrest." I wanted to speak to my attorney at that time. He wouldn't permit it until he went and got orders from someone else to have my attorney talk to me.

Q. All right. That is all. Is there anything you want to add to it?

A. No, not at this particular time.

The Court: Any questions you wish to ask, Mr. Zangara?

Mr. Zangara: No.

Mr. Hurley: I would just like to ask him a question.

By Mr. Hurley:

Q. In connection with your work, Gotham Claims Agency, do you carry a weapon?

A. I don't carry it on me, sir. I never do. I am licensed.

Q. You are licensed?

A. With a permit. But I don't——

Q. You are licensed to carry a weapon?

A. Yes, sir.

Q. But you just don't carry it with you?

A. No, sir, I don't.

Q. Do you carry it sometimes?

[fol. 104] A. No, sir, I don't. As a rule, I don't carry a weapon.

Q. As a rule you don't carry a weapon?

A. May I make a statement? Unless I am working in Harlem or some particular area there or some section where it is a rough section, I usually carry it.

Q. I see.

A. All right?

The Court: Thank you. You may stay. Mr. Santarsieri, I will be glad to hear you.

(Witness excused.)

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MICHAEL SANTARSIERI, 324<sup>o</sup> Wilson Avenue, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

By the Court:

Q. You heard what was said?

A. Yes, sir, I have.

Q. I will be glad to hear you.

A. In regard to Mr. Bluestein's testimony, about what occurred this morning, about 10 minutes to 11:00 on the 24th of April, in my capacity as a court officer, I escorted Mr. Bluestein from the court, after he had been held in contempt by Mr. Justice Arkwright. As I approached the doorway, I called the other court officer present, Mr. Tom [fol. 105] Liston, over to the water cooler. I informed him that Mr. Bluestein was held in contempt of court and that he should watch him while I returned to the court to continue my duties.

Mr. Bluestein went over, he sat down in the corner. After he did that, I walked over to the water cooler, took a drink of water. I stated to the other court officer, I said, "The attorney has made false and defamatory statements about me," or words in that substance. I said, "He de-



famed me in court, by accusing me of an illegal search and seizure and I think I can get some money if I sue him." That was the extent of my conversation.

The Court: All right. Any questions, Mr. Zangara?

Mr. Zangara: No, your Honor, no questions.

The Court: All right.

A. (continuing) In regards to Mr. Neal Percudani, on the 22nd of April, about 11:00 A. M. in the morning, after he had completed his testimony on this stand, he was told by Mr. Justice Arkwright that he was in contempt. His Honor instructed the witness to sit on the side of the court. His Honor then changed that request, and told him to sit outside. I accompanied the witness outside, and [fol. 106] instructed him to sit in the corner. He asked me if he could leave to talk to his attorney. I said he was held under contempt, and I would have to wait to see if the Judge would hold him in bail or commit him to the Sheriff.

At that time Court Officer Liston was present from the time I opened the door until the time Mr. Percudani sat down. I categorically deny that at any time I placed my hands upon him, searched, frisked, tossed him or any other connotations he may wish to use.

Mr. Percudani: Your Honor, may I question him?

The Court: You may.

The Witness: I haven't completed my testimony, sir.

The Court: Go ahead then. You may finish.

A. (continuing) He asked me if he could see his lawyer, and I instructed him that I would have to have the other court officer ask the Judge if he could see his attorney. Mr. Liston returned and said that it was all right for him to speak to his attorney. I then notified Mr. Zangara that he could speak to his client. Mr. Zangara came over and I told him that the Judge had held him in contempt. And that he could not leave. Mr. Zangara said the Judge has no authority to commit him to the Sheriff. All he [fol. 107] can do is fine him. He says, "This is merely a legislative committe, and they have no right to hold him."

I said, "That is up to the Judge to decide, but I think he may be able to hold him for the Sheriff.

The Court: Anything else?

Mr. Zangara: I have no questions.

The Court: All right. Does the other court officer wish to say anything?

(Witness excused.)

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The Court: The only reason I ask you that is that you were referred to by Mr. Santarsieri. Do you wish to add to anything he said?

Mr. Liston: Nothing to add, Judge.

The Court: All right.

As I say, that has got nothing to do with the investigation, as such. That is in regard to the staff.

Now, let me see. Is there anything for me?

Mr. Giustiniani: Yes, your Honor, I have a doctor waiting that was postponed from yesterday.

The Court: Do you want to take him now?

Mr. Giustiniani: Yes, if I may, your Honor.

The Court: All right. Then Mr. Percudani and Mr. Bluestein will wait a while, and Mr. Zangara, if you will wait around—

[fol. 108] Mr. Zangara: Can I ask you what your disposition will be?

The Court: I will tell you about that when we get around to it. I don't want to announce it right now.

Mr. Zangara: You are going to announce it—

The Court: I will call you in when I announce it.

Mr. Zangara: The reason why I ask you is because I was supposed to select a jury in the Supreme Court at 11:30 this morning.

The Court: It won't be long.

Mr. Zangara: The jury clerk is probably still waiting for me. May I go over there and talk to him?

The Court: Oh, surely, you may go over and come back. Your clients here are in custody of the court officer.

Mr. Zangara: Could you parole them to my custody?

The Court: No, I will not. Do you want to come back—

Mr. Zangara: I will be right back in five minutes.

The Court: You don't have to hurry that fast, because I have other witnesses.

[fol. 109] Mr. Zangara: Have you any idea, Judge—may I ask your Honor when we may dispose of this contempt?

The Court: Yes, as soon as I have the necessary papers before me to see what I am going to do.

Mr. Zangara: Thank you, your Honor.

Mr. Hurley: May we take a brief recess now?

The Court: Yes. Do you want a recess for a few minutes?

Mr. Hurley: Yes.

The Court: You may.

(A brief recess was taken.)

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[fol. 110] AFTERNOON SESSION—2:10 P. M.

COLLOQUY BETWEEN COURT AND COUNSEL;  
FINDING OF CONTEMPT AND SENTENCE

The Court: Will you have Mr. Zangara come in and Mr. Bluestein.

(Mr. Zangara and Mr. Bluestein entered the courtroom.)

The Court: Mr. Bluestein, Mr. Zangara, in accordance with Section 750 of the Judiciary Law, I have held you for criminal contempt because you violated Section 750, subdivision 5, of the Judiciary Law, in that you were contumacious and unlawfully refused, after having been sworn, to answer legal and proper interrogatories.

It also provides in the same law for punishment for such an offense, one of which is a fine or imprisonment, or both.

Mr. Zangara, I will be very glad to hear anything you have to say in regard to what you think I should do.

Mr. Zangara: If your Honor please, I have had a writ signed by the Judge sitting in Special Term, Part II.

The Court: I see. I haven't done anything yet.

Mr. Zangara: You have been holding him in contempt, you have held him today.

The Court: Yes.

[fol. 111] Mr. Zangara: I have a writ, returnable this afternoon.

The Court: I see. That is all you wish to say?

Mr. Zangara: No. With reference to the punishment?

The Court: Yes.

Mr. Zangara: Would your Honor like to see a copy of this? (Handed the Court.)

The Court: Go right ahead. I will hear whatever you have to say.

Mr. Zangara: I respectfully request your Honor to consider the reasons, as I previously stated, as to why Mr. Bluestein refused to answer the questions before your Honor. I feel under the circumstances that no fine or imprisonment should be imposed, and that in the event that there is a fine or imprisonment imposed, that your Honor allow time to review his Order and provide a copy of the minutes of this hearing.

The Court: As I told you before, in regard to the copy of the minutes, that you will have to apply to the Appellate Division to secure.

I am going to commit Mr. Bluestein to the County Jail of this County for thirty days, and I will sign the order of commitment now. We cannot allow an investigation to be hampered in this manner. If we do, we might as well give [fol. 112] up this investigation.

All right. Now let's take the next matter.

Mr. Zangara: If your Honor please, may I be served with a copy of that mandate?

The Court: Mr. Hurley will—

Mr. Zangara: At my expense.

The Court: Mr. Hurley will do that. You see, the copies have to be conformed, and so forth.

Mr. Zangara: Thank you very much, your Honor. One other request:—

The Court: Let's take Mr. Percudani.

Mr. Zangara: May I have one other request with reference to Mr. Bluestein?

The Court: Yes.

Mr. Zangara: Would your Honor release Mr. Bluestein in my custody and my parole?

The Court: No, I refuse to do it.

Mr. Zangara: Until the hearing is—

The Court: No, I refuse to do it.

Mr. Zangara: Will you fix bail for him?

The Court: No, I refuse to fix bail.

Mr. Zangara: Will you allow us time to review your Order?

The Court: That is up to you. I am committing him now, and you will have to pursue whatever remedies [fol. 113] you wish.

Mr. Zangara: Thank you very much, your Honor.

Mr. Bluestein: May I speak to my attorney for one minute, please?

The Court: Yes.

(Mr. Bluestein and Mr. Zangara conferred in the rear of the courtroom.)

The Court: Will you bring in Mr. Percudani?

(Mr. Bluestein retired from the courtroom and Mr. Percudani entered the courtroom.)

The Court: Mr. Percudani, you have been guilty of a violation of the Judiciary Law, Section 750, and I am holding you in contempt of court on the ground that you have been contumacious and you unlawfully refused, after having been duly sworn, to answer the legal and proper interrogatories that were asked you, and pursuant to Section 751 for punishment—before I say what the punishment will be, I will hear from your attorney.

Mr. Zangara: I make the same plea for Mr. Percudani as I made for Mr. Bluestein.

The Court: All right. I deny the application that you made, and I commit Mr. Percudani to the County Jail of this County for thirty days. I will sign the Order and the commitment right now.

[fol. 114] I don't intend to have this investigation stymied by actions that are not lawful, and I am going to put a stop to it. We have given you every opportunity to do what you thought was proper, and you haven't done what I think is proper.

Mr. Zangara: I am only acting, Judge, as counsel, to the best of my ability, for my clients.

The Court: You are only acting as counsel? I thought you were attorney.



Mr. Zangara: As attorney, to the best of my ability, for my clients.

The Court: Mr. Hurley will straighten out the service of the papers, and so forth, with you.

Mr. Zangara: May I make one more request, if your Honor please?

The Court: Certainly.

Mr. Zangara: May Mr. Percudani and Mr. Bluestein be held here until they have to appear this afternoon?

The Court: No. It is going to take its regular course, whatever that is, and you will have to be guided accordingly.

Mr. Zangara: Under the circumstances, they are reputable citizens, they have been doing business in Brooklyn for over six years, they have families, they have children—it isn't a question—

[fol. 115] There is no question of not appearing.

The Court: It is not a question of being reputable or disreputable. It is a question of, they refused to answer lawful questions, and as far as I am concerned, I am going to stop this practice.

Mr. Zangara: I understand your Honor's position, but can they be held here instead of in the County Jail?

The Court: No, they cannot. I have told you what I am going to do and that is done. It will take its course, and then you may do whatever you wish about it.

Mr. Zangara: I have a writ, I have already served a writ. Thank you very much, your Honor. Thank you for your patience.

The Court: You are welcome.

(Mr. Zangara and Mr. Percudani retired from the courtroom.)

[fol. 115A] Reporter's Certificate (omitted in printing).

[fol. 116]

**SUPREME COURT  
OF THE STATE OF NEW YORK**

**APPELLATE DIVISION—SECOND DEPARTMENT**

In the Matter of the Application of

ANONYMOUS No. 6, Petitioner,

for an order pursuant to Article 78 C.P.A., to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

ORDER TO SHOW CAUSE—April 26, 1958

Upon the petition of Howard Bluestein, sworn to the 25th day of April, 1958, and the exhibit thereto attached, Let the respondent, the Honorable George A. Arkwright, as Justice of the Supreme Court, or his counsel, show cause before this Court on the 30th day of April, 1958, at 2 o'clock in the afternoon at the Courthouse, located at 45 Monroe Place, Brooklyn, New York,

Why this Court should not review and annul the determination and mandate made by respondent on April 24, 1958, pursuant to which petitioner was lodged in the Civil Prison of the City of New York, and for such other and further relief as my (sic) be just and proper.

[fol. 117] And in the meantime and pending the final order herein, Let the Sheriff of the City of New York release the petitioner on bond upon presentation to the Sheriff of a certified copy of this order, together with a certificate of the filing of a surety company bond in the sum of \$2,500.00 in the Office of the Clerk of this Court.

And sufficient reason appearing therefor, Let service of a copy of this order and the papers upon which it is based upon respondent, or his counsel, on or before the 28th day of April, 1958, at 12:00 o'clock be deemed sufficient service.

Dated, April 26, 1958.

/s/ Charles E. Murphy, Associate Justice, Appellate  
Division Supreme Court, Second Judicial Department.

[fol. 118]

**SUPREME COURT  
OF THE STATE OF NEW YORK**

**APPELLATE DIVISION—SECOND DEPARTMENT**

**APPLICATION OF**

**HOWARD BLUESTEIN, Petitioner,**

**—against—**

**HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent,  
Pursuant to Article 78 of the Civil Practice Act.**

**PETITION—Filed April 25, 1958**

**To the Appellate Division of the Supreme Court, Second  
Department:**

The petition of Howard Bluestein, by Raphael H. Weissman, his attorney, respectfully shows:

1. That at all the times herein mentioned, petitioner was and still is a citizen of the United States and a resident of the State of New York. That at all the times herein mentioned, petitioner was and is a licensed private detective and investigator, duly licensed by the State of New York, and did and does conduct business as such with Neil Perjudani, another private detective and investigator, similarly licensed by the State of New York, as Gotham Claims Bureau at 16 Court Street, Brooklyn, New York.

[fol. 119] 2. That at all the times herein mentioned, the Honorable George A. Arkwright was and still is a Justice of the Supreme Court of the State of New York.

3. Petitioner is now imprisoned in the Civil Prison of the City of New York, located at 434 West 37th Street, New York City.

4. Petitioner was lodged in said prison on April 24, 1958, in execution of a mandate made by the respondent, Mr. Justice Arkwright, on the 24th day of April, 1958 (hereafter called the mandate); a copy of the mandate is hereto attached as Exhibit A.

5. The mandate does not contain a full and complete recital of all the facts relating to the alleged offense for which petitioner was imprisoned.

6. There is extant a stenographic record of further facts that occurred at the time of the alleged commission of the alleged offense.

7. The stenographic record shows that before petitioner was called to give answers to the questions recited in the mandate, petitioner was told by an attorney, who is an assistant to Denis M. Hurley, Esq., designated to aid the respondent in the conduct of the inquiry recited in the mandate, that the inquiry has already developed evidence of a prima facie case of several crimes allegedly committed by the petitioner.

[fol. 120] 8. The stenographic record further shows that at the times recited in the mandate when petitioner was asked the several questions, petitioner and his counsel, Anthony Zangara, Esq., requested permission from Mr. Justice Arkwright that petitioner should be allowed to be represented by counsel during his examination. The record further shows that petitioner and his counsel made it clear to Mr. Justice Arkwright that petitioner's request to be represented by counsel during his interrogation was claimed under due process guaranteed by the 14th Amendment of the Constitution of the United States and by Article 4 of the Constitution of the State of New York.

9. The record further shows that Mr. Justice Arkwright denied the request of petitioner and his counsel, and excluded petitioner's counsel from the courtroom when the questions recited in the mandate on the several days stated in the mandate were put to petitioner.

10. The record further shows that only after Mr. Justice Arkwright refused the aforesaid request of petitioner and his counsel did petitioner respectfully refuse to answer on the ground that he was being denied the due process aforesaid.

11. Mr. Justice Arkwright's denial of the aforesaid request for representation by counsel constituted an abuse of discretion.

12. Mr. Justice Arkwright's denial of the aforesaid request for representation by counsel constituted a denial of due process of law guaranteed by the 14th Amendment of [fol. 121] the Constitution of the United States and by the Constitution of the State of New York.

13. Petitioner is married and lives with his wife and infant child at 5413 Kings Highway, Brooklyn, New York.

14. Petitioner has no other remedy.

Wherefore, petitioner prays that this Court review and annul the determination and mandate made by Mr. Justice Arkwright, and direct the immediate release of petitioner from imprisonment, and that this Court, by order to show cause, grant a stay of the continued execution of the mandate by releasing petitioner upon such terms as may be just, pending the final order herein, and for such other and further relief as may be just and proper in the premises.

Dated, April 25, 1958.

/s/ Howard B. Bluestein, Petitioner.

Raphael H. Weissman, Attorney for Petitioner/ Office & P. O. Address: 185 Montague Street, Borough of Brooklyn, City of New York.

[fol. 122] VERIFICATION (omitted in printing).

[fol. 123]

ORDER OF APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT  
OMITTED. PRINTED SIDE FOLIO 7, SUPRA



[fol. 124]

## EXHIBIT 'D' TO AFFIDAVIT

SUPREME COURT  
OF THE STATE OF NEW YORK

## APPELLATE DIVISION—SECOND DEPARTMENT

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In the Matter of the Application of  
ANONYMOUS No.

Petitioner,

For an Order Pursuant to Article 78, C.P.A. to Review and  
Annul the Determination and Mandate of theHONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent.

---

ANSWER AND RETURN

The respondent, HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York, County of Kings, for answer and return to the petition of Howard Bluestein, respectfully alleges:

FIRST: Denies each and every allegation contained in paragraphs 11, 12 and 14 of the petition.

SECOND: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs 1 and 13 of the petition.

THIRD: Denies each and every allegation contained in paragraph 5 of the petition, except admits that the mandate does not recite all of the evidentiary facts relating to the offense for which petitioner was imprisoned and alleges that the mandate does contain a statement of all of the essential ultimate facts required by law.

FOURTH: Denies each and every allegation contained in paragraph 7 of the petition and respondent respectfully re-

[fol. 125] fers this Court to the said stenographic record, constituting part of respondent's return to the petition, for a full and accurate account of what occurred before the petitioner was called to answer the questions recited in said mandate.

**FIFTH:** Denies each and every allegation contained in paragraph 8 of the petition, except admits that petitioner and his counsel requested that respondent permit petitioner to be represented by his counsel in the courtroom during his examination and respondent respectfully refers to said stenographic record, constituting part of respondent's return to the petition, for a full and accurate account of the request of petitioner and of his counsel.

**SIXTH:** Denies each and every allegation contained in paragraph 10 of the petition, except admits that petitioner was interrogated and refused to answer questions after respondent denied the request that his counsel should be permitted to remain in the courtroom while petitioner was being examined and respondent respectfully refers to such stenographic record, constituting part of respondent's return to the petition, for a full and accurate account of what was said and done.

**AS AND FOR A SEPARATE AFFIRMATIVE AND COMPLETE DEFENSE TO THE ALLEGATIONS OF THE PETITION AND BY WAY OF RETURN TO THIS COURT, RESPONDENT RESPECTFULLY ALLEGES:**

**SEVENTH:** Respondent returns to this Court a certified copy of the order made by respondent and a certified copy of the mandate issued pursuant thereto, each dated April 24, 1958, together with a certified copy of a full and accurate stenographic record of all of the testimony involving [fol. 126] the petitioner before the Additional Special Term of the Supreme Court, Kings County, from which it clearly appears that petitioner was legally and properly held in contempt of court and ordered to be punished pursuant to law by respondent.

**EIGHTH:** The petitioner was called to the witness stand merely as a witness, and a witness, as such, has no constitutional right to be represented by counsel on his examination before respondent in such a Judicial Inquiry as this Court directed respondent to conduct by its order of January 21, 1957, as amended on February 11, 1957. Neither the federal nor the New York State Constitution guarantees a witness, as such, the right of counsel; that right is guaranteed to a party or to an accused only. The claim asserted by petitioner's attorney that it appeared that petitioner was a potential or prospective party or accused did not change petitioner's status. Until he should actually become a party or an accused within the meaning of the Constitution, he remains a witness only. Under the order of this Court of January 21, 1957, as amended, neither the Additional Special Term nor respondent, as the Supreme Court Justice presiding thereat, has any jurisdiction nor authority to prefer charges or to make accusations against any person. In the absence of any factual basis for regarding the petitioner as an actual party or as an actual accused, there is no violation of his constitutional right and no denial of due process. The petitioner and his counsel were specifically advised of respondent's views of the law and they were repeatedly warned of the consequences of petitioner's refusal to answer legal and proper questions. The petitioner was given every opportunity by respondent to testify or to change the ground of his refusal to testify.

[fol. 127] **NINTH:** While in court before respondent, petitioner and his counsel complained in general terms of threats made against, and intimidation of, petitioner and his counsel by members of the staff of the Judicial Inquiry. Thereupon, as the return shows, respondent on April 24, 1958, immediately conducted a full hearing on such charges. After hearing the evidence of both sides, it is respondent's considered opinion that the charges were not sustained, that the so-called threats and intimidation were nothing more than statements of opinion by members of the staff of the Judicial Inquiry and fair warnings to petitioner and his counsel in effect meaning that unless petitioner testified truthfully to facts within his knowledge instead of trying

to save others by concealing the facts that would implicate such other persons, specifically attorneys for whom he had rendered services, the petitioner might find himself subject to charges. In respondent's judgment, such statements by members of the staff of the Judicial Inquiry, as they swore to making, were proper statements for an investigator to make to a witness and they were definitely made in the line of duty and cannot be regarded as in the nature of threats or intimidation.

**TENTH:** The wall of privacy around the Judicial Inquiry erected by this Court, by its order of January 21, 1957, to protect the reputations of innocent witnesses, steadfastly maintained by respondent for the past 15 months would quickly be breached were respondent to deviate from his uniform rule of treating all witnesses alike by holding that no witness is entitled to be represented by an attorney during his interrogation in court. Some attorneys and firms of attorneys representing witnesses have appeared with counsel and in some instances the same attorney has appeared for a number of different witnesses. Over 50 attorneys have thus far appeared for witnesses in this Judicial Inquiry. None of them is under any mandate to observe secrecy. If over 50 attorneys should be allowed to hear the testimony, even separately, of more than 50 witnesses, the proceedings of the Judicial Inquiry would no longer be private. Had respondent permitted all of the attorneys of record and all of the counsel who have thus far appeared for witnesses to be present in court during the examination of their respective clients, the secrecy of this investigation would have long since ended. While respondent recognizes that the claims of some witnesses to the desirability of having counsel present may be stronger in some cases than in others (because, for example, they may themselves later possibly become implicated in wrongdoing), any relaxation of the rule as to counsel would not only result in different treatment for different witnesses, but would soon jeopardize all privacy of the proceedings before the Judicial Inquiry.

**ELEVENTH:** Under all of the circumstances, therefore, there was no abuse of discretion on respondent's part in

denying petitioner the right of representation by attorney during his examination in this Judicial Inquiry and Investigation and there was no substantial constitutional question raised before respondent and there is none before this Court.

Wherefore, respondent prays that the petition be dismissed; that respondent's order and mandate, each dated April 24, 1958, be confirmed, and that a final order of this Court be made and entered herein remanding the petitioner to the civil prison of the City of New York, there to serve [fol. 129] the balance of his term in compliance with the mandate made herein by respondent on April 24, 1958.

Denis M. Hurley  
Attorney for Respondent  
Office and Post Office Address  
Borough Hall, Room 301  
Brooklyn, N. Y.

[fol. 130]

STATE OF NEW YORK,  
CITY OF NEW YORK,  
COUNTY OF KINGS, ss.:

GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York, being duly sworn, deposes and says:

That he is the Respondent in the within proceeding; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes them to be true.

/s/ GEORGE A. ARKWRIGHT

Sworn to before me this  
29th day of April, 1958.

Richard Eric Alleyne  
Notary Public, State of New York  
No. 24-0049135 Qual. in Kings County  
Commission Expires March 30, 1959



[fol 131]

IN THE APPELLATE DIVISION, SECOND JUDICIAL CIRCUIT

OPINION AND DECISION SLIP—Filed May 26, 1958

No. 502. In the Matter of the Application of Anonymous No. 6, petitioner, for an order pursuant to Article 78 of the Civil Practice Act, to review and annul the determination and mandate of the Honorable George A. Arkwright, as Justice of the Supreme Court, respondent.

Proceeding to review a determination adjudging petitioner, a licensed private detective and investigator, guilty of a criminal contempt for refusing to answer questions at a judicial inquiry, and imposing punishment. Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation.

Petitioner contends that special facts distinguish this proceeding from Matter of Anonymous (M.) v. Arkwright (5 A D 2d 790) and Matter of Anonymous (S.) v. Arkwright (5 A D 2d 792, leave to appeal denied in both proceedings — N Y 2d —, April 2, 1958) is that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney.

Determination unanimously confirmed, without costs. No opinion.

Present: Nolan, P.J., Wenzel, Beldock, Ughetta and Hallinan, JJ.

(Seal)

[fol. 132]

**SUPREME COURT  
OF THE STATE OF NEW YORK  
APPELLATE DIVISION—SECOND DEPARTMENT**

In the Matter of the Application of  
ANONYMOUS No. 7, Petitioner,

For an Order Pursuant to Article 78, C.P.A. to Review and  
Annul the Determination and Mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

ORDER TO SHOW CAUSE—Filed April 26, 1958

Upon the petition of Neal Percudani, sworn to the 25th day of April, 1958, and the exhibit thereto attached, Let the respondent, the Honorable George A. Arkwright, as Justice of the Supreme Court, or his counsel, show cause before this Court on the 30th day of April, 1958, at 2 o'clock in the afternoon at the Courthouse, located at 45 Monroe Place, Brooklyn, New York.

Why this Court should not review and annul the determination and mandate made by respondent on April 24, 1958, pursuant to which petitioner was lodged in the Civil Prison of the City of New York, and for such other and further relief as may be just and proper.

And in the meantime and pending the final order herein, Let the Sheriff of the City of New York release the petitioner on bond upon presentation to the Sheriff of a certified copy of this order, together with a certificate of the filing of a surety company bond in the sum of \$2500 in the office of the Clerk of this Court.

And sufficient reason appearing therefor, Let service of a copy of this order and the papers upon which it is based upon respondent, or his counsel, on or before the 28th day of April, 1957, at 12 o'clock be deemed sufficient service.

Dated, April 26, 1958.

/s/ Charles E. Murphy, Associate Justice, Appellate  
Division, Supreme Court, Second Judicial Department.

[fol. 134]

SUPREME COURT  
OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

APPLICATION OF  
NEAL PERCUDANI, Petitioner,  
—against—

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

Pursuant to Article 78 of the Civil Practice Act.

PETITION—Filed April 25, 1958

To the Appellate Division of the Supreme Court,  
Second Department:

The petition of Neal Percudani, by Raphael H. Weissman, his attorney, respectfully shows:

1. That at all the times herein mentioned, petitioner was and still is a citizen of the United States and a resident of the State of New York. That at all the times herein mentioned, petitioner was and is a licensed private detective and investigator, duly licensed by the State of New York, and did and does conduct business as such with Howard Bluestein, another private detective and investigator, similarly licensed by the State of New York, as Gotham Claims Bureau at 16 Court Street, Brooklyn, New York.

[fol. 135] 2. That at all the times herein mentioned, the Honorable George A. Arkwright was and still is a Justice of the Supreme Court of the State of New York.

3. Petitioner is now imprisoned in the Civil Prison of the City of New York, located at 434 West 37th Street, New York City.

4. Petitioner was lodged in said prison on April 24, 1958, in execution of a mandate made by the respondent,

Mr. Justice Arkwright, on the 24th day of April, 1958 (hereafter called the mandate); a copy of the mandate is hereto attached as Exhibit A.

5. The mandate does not contain a full and complete recital of all the facts relating to the alleged offense for which petitioner was imprisoned.

6. There is extant a stenographic record of further facts that occurred at the time of the alleged commission of the alleged offense.

7. The stenographic record shows that before petitioner was called to give answers to the questions recited in the mandate, petitioner was told by an attorney, who is an assistant to Denis M. Hurley, Esq., designated to aid the respondent in the conduct of the inquiry recited in the mandate, that the inquiry has already developed evidence of a prima facie case of several crimes allegedly committed by the petitioner.

[fol. 136] 8. The stenographic record further shows that at the times recited in the mandate when petitioner was asked the several questions, petitioner and his counsel, Anthony Zangara, Esq., requested permission from Mr. Justice Arkwright that petitioner should be allowed to be represented by counsel during his examination. The record further shows that petitioner and his counsel made it clear to Mr. Justice Arkwright that petitioner's request to be represented by counsel during his interrogation was claimed under due process guaranteed by the 14th Amendment of the Constitution of the United States and by Article 4 of the Constitution of the State of New York.

9. The record further shows that Mr. Justice Arkwright denied the request of petitioner and his counsel, and excluded petitioner's counsel from the courtroom when the questions recited in the mandate on the several days stated in the mandate were put to petitioner.

10. The record further shows that only after Mr. Justice Arkwright refused the aforesaid request of petitioner and his counsel did petitioner respectfully refuse to answer

on the ground that he was being denied the due process aforesaid.

11. Mr. Justice Arkwright's denial of the aforesaid request for representation by counsel constituted an abuse of discretion.

12. Mr. Justice Arkwright's denial of the aforesaid request for representation by counsel constituted a denial of due process of law guaranteed by the 14th Amendment of [fol. 137] the Constitution of the United States and by the Constitution of the State of New York.

13. Petitioner is married and lives with his wife and three small children at 1489 Lake Shore Drive, Massapequa Park, Nassau County, State of New York, in a home which is owned by us.

14. Petitioner has no other remedy.

Wherefore, petitioner prays that this Court review and annul the determination and mandate made by Mr. Justice Arkwright, and direct the immediate release of petitioner from imprisonment, and that this Court, by order to show cause, grant a stay of the continued execution of the mandate by releasing petitioner upon such terms as may be just, pending the final order herein, and for such other and further relief as may be just and proper in the premises.

Dated, April 25, 1958.

/s/ Neal Percudani, Petitioner.

Raphael H. Weissman, Attorney for Petitioner, Office & P. O. Address: 185 Montague Street, Borough of Brooklyn, City of New York.

[fol. 138] VERIFICATION (omitted in printing).

[fol. 139]

ORDER OF APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT  
OMITTED. PRINTED SIDE FOLIO 42, SUPRA



[fol. 140]

## EXHIBIT "I" TO AFFIDAVIT

SUPREME COURT  
OF THE STATE OF NEW YORK

## APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of

ANONYMOUS No.

Petitioner,

For an Order Pursuant to Article 78, C.P.A., to Review and  
Annul the Determination and Mandate of theHONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT,

Respondent.

## ANSWER AND RETURN

The respondent, HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York, County of Kings, for answer and return to the petition of Neal Percudani, respectfully alleges:

FIRST: Denies each and every allegation contained in paragraphs 11, 12 and 14 of the petition.

SECOND: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs 1 and 13 of the petition.

THIRD: Denies each and every allegation contained in paragraph 5 of the petition, except admits that the mandate does not recite all of the evidentiary facts relating to the offense for which petitioner was imprisoned and alleges that the mandate does contain a statement of all of the essential ultimate facts required by law.

FOURTH: Denies each and every allegation contained in paragraph 7 of the petition and respondent respectfully [fol. 141] refers this Court to the said stenographic record, constituting part of respondent's return to the petition, for

a full and accurate account of what occurred before the petitioner was called to answer the questions recited in said mandate.

**FIFTH:** Denies each and every allegation contained in paragraph 8 of the petition, except admits that petitioner and his counsel requested that respondent permit petitioner to be represented by his counsel in the courtroom during his examination and respondent respectfully refers to said stenographic record, constituting part of respondent's return to the petition, for a full and accurate account of the request of petitioner and of his counsel.

**SIXTH:** Denies each and every allegation contained in paragraph 10 of the petition, except admits that petitioner was interrogated and refused to answer questions after respondent denied the request that his counsel should be permitted to remain in the courtroom while petitioner was being examined and respondent respectfully refers to such stenographic record, constituting part of respondent's return to the petition, for a full and accurate account of what was said and done.

**AS AND FOR A SEPARATE AFFIRMATIVE AND COMPLETE DEFENSE TO THE ALLEGATIONS OF THE PETITION AND BY WAY OF RETURN TO THIS COURT, RESPONDENT RESPECTFULLY ALLEGES:**

**SEVENTH:** Respondent returns to this Court a certified copy of the order made by respondent and a certified copy of the mandate issued pursuant thereto, each dated April 24, 1958, together with a certified copy of a full and accurate stenographic record of all of the testimony involving the [fol. 142] petitioner before the Additional Special Term of the Supreme Court, Kings County, from which it clearly appears that petitioner was legally and properly held in contempt of court and ordered to be punished pursuant to law by respondent.

**EIGHTH:** The petitioner was called to the witness stand merely as a witness, and a witness, as such, has no constitutional right to be represented by counsel on his examination before respondent in such a Judicial Inquiry as this

Court directed respondent to conduct by its order of January 21, 1957, as amended on February 11, 1957. Neither the federal nor the New York State Constitution guarantees a witness, as such, the right of counsel; that right is guaranteed to a party or to an accused only. The claim asserted by petitioner's attorney that it appeared that petitioner was a potential or prospective party or accused did not change petitioner's status. Until he should actually become a party or an accused within the meaning of the Constitution, he remains a witness only. Under the order of this Court of January 21, 1957, as amended, neither the Additional Special Term nor respondent, as the Supreme Court Justice presiding thereat, has any jurisdiction nor authority to prefer charges or to make accusations against any person. In the absence of any factual basis for regarding the petitioner as an actual party or as an actual accused, there is no violation of his constitutional right and no denial of due process. The petitioner and his counsel were specifically advised of respondent's views of the law and they were repeatedly warned of the consequences of petitioner's refusal to answer legal and proper questions. The petitioner was given every opportunity by respondent to testify or to change the ground of his refusal to testify.

[fol. 143] NINTH: While in court before respondent, petitioner and his counsel complained in general terms of threats made against, and intimidation of, petitioner and his counsel by members of the staff of the Judicial Inquiry. Thereupon, as the return shows, respondent on April 24, 1958, immediately conducted a full hearing on such charges. After hearing the evidence of both sides, it is respondent's considered opinion that the charges were not sustained, that the so-called threats and intimidation were nothing more than statements of opinion by members of the staff of the Judicial Inquiry and fair warnings to petitioner and his counsel in effect meaning that unless petitioner testified truthfully to facts within his knowledge instead of trying to save others by concealing the facts that would implicate such other persons, specifically attorneys for whom he had rendered services, the petitioner might find himself subject to charges. In respondent's judgment, such

statements by members of the staff of the Judicial Inquiry, as they swore to making, were proper statements for an investigator to make to a witness and they were definitely made in the line of duty and cannot be regarded as in the nature of threats or intimidation.

TENTH: The wall of privacy around the Judicial Inquiry erected by this Court, by its order of January 21, 1957, to protect the reputations of innocent witnesses, steadfastly maintained by respondent for the past 15 months would quickly be breached were respondent to deviate from his uniform rule of treating all witnesses alike by holding that no witness entitled to be represented by an attorney during his interrogation in court. Some attorneys and firms of attorneys representing witnesses have appeared with counsel and in some instances the same attorney has appeared [fol. 144] for a number of different witnesses. Over 50 attorneys have thus far appeared for witnesses in this Judicial Inquiry. None of them is under any mandate to observe secrecy. If over 50 attorneys should be allowed to hear the testimony, even separately, of more than 50 witnesses, the proceedings of the Judicial Inquiry would no longer be private. Had respondent permitted all of the attorneys of record and all of the counsel who have thus far appeared for witnesses to be present in court during the examination of their respective clients, the secrecy of this investigation would have long since ended. While respondent recognizes that the claims of some witnesses to the desirability of having counsel present may be stronger in some cases than in others (because, for example, they may themselves later possibly become implicated in wrongdoing), any relaxation of the rule as to counsel would not only result in different treatment for different witnesses, but would soon jeopardize all privacy of the proceedings before the Judicial Inquiry.

ELEVENTH: Under all of the circumstances, therefore, there was no abuse of discretion on respondent's part in denying petitioner the right of representation by attorney during his examination in this Judicial Inquiry and Investigation and there was no substantial constitutional question

raised before respondent and there is none before this Court.

WHEREFORE, respondent prays that the petition be dismissed, that respondent's order and mandate, each dated April 24, 1958, be confirmed, and that a final order of this Court be made and entered herein remanding the petitioner to the civil prison of the City of New York, there to serve [fol. 145] the balance of his term in compliance with the mandate made herein by respondent on April 24, 1958.

Denis M. Hurley  
Attorney for Respondent  
Office and Post Office Address  
Borough Hall, Room 301  
Brooklyn, N. Y.

[fol. 146]

STATE OF NEW YORK,  
CITY OF NEW YORK,  
COUNTY OF KINGS, ss.:

GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York, being duly sworn, deposes and says:

That he is the Respondent in the within proceeding; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes them to be true.

/s/ GEORGE A. ARKWRIGHT

Sworn to before me this  
29th day of April, 1958.

JOHN P. CLARKE  
Notary Public, State of New York  
No. 24-0658475 Qual. in Kings County  
Commission Expires March 30, 1959.



[fol. 147]

IN THE APPELLATE DIVISION, SECOND JUDICIAL CIRCUIT

## OPINION AND DECISION SLIP—Filed May 26, 1958

No. 503. In the Matter of the Application of Anonymous No. 7, petitioner, for an order pursuant to Article 76 of the Civil Practice Act, to review and annul the determination and mandate of the Honorable George A. Arkwright, as Justice of the Supreme Court, respondent.

Proceeding to review a determination adjudging petitioner, a licensed private detective and investigator, guilty of a criminal contempt for refusing to answer questions at a judicial inquiry, and imposing punishment. Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation.

Petitioner contends that special facts distinguish this proceeding from Matter of Anonymous (M.) v. Arkwright (5 A D 2d 790) and Matter of Anonymous (S.) v. Arkwright (5 A D 2d 792, leave to appeal denied in both proceedings — N Y 2d —, April 2, 1958), in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney.

Determination unanimously confirmed, without costs. No opinion.

Present: Nolan, P.J., Wenzel, Beldock, Ughetta and Hallinen, JJ.

[fol. 148]

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of  
~~ANONYMOUS~~ No. 6, Petitioner-Appellant,  
for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of the  
HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent-Respondent.

AFFIDAVIT OPPOSING MOTION TO DISMISS APPEAL

*(Oral argument is requested)*

State of New York,  
County of Kings, ss.:

HOWARD BLUESTEIN, being duly sworn, says:

I am the appellant herein. I make this affidavit in opposition to respondent's motion to dismiss my appeal.

Respondent takes the ground that my appeal does not raise a substantial constitutional question.

The moving papers attach a copy of my affidavit in support of the order to show cause signed by Chief Judge Conway herein (Exhibit "F"). I asserverate (sic) the truth of the facts therein stated.

My said affidavit states the relevant facts and shows by reference to relevant authorities that my appeal presents a substantial constitutional question. I will not burden [fol. 149] the Court with a restatement of those matters here. I respectfully refer the Court to that affidavit as though fully again set forth herein.

This affidavit will treat only additional matters.

As further evidence of peril of criminal prosecution resulting from testimony given before Mr. Justice Arkwright, I refer this Court to a summary report of the

activities of the Judicial Inquiry, made and filed by Mr. Justice Arkwright in the Appellate Division, Second Department, on June 11, 1958. I attach hereto photostatic copies of pages 5 and 6 of that report. The pertinent parts are indicated by red pencil. The underscoring is supplied.

The question presented by this motion is not precluded by *M. Anonymous v. Arkwright* (5 App. Div. 2d 790, leave to appeal denied by this Court on April 3, 1958).

The person there involved was a lawyer. Appellant is a layman. In view of the charge that a *prima facie* case of crime had already been made out against appellant before appellant was called to testify, appellant needed the guiding hand of counsel in the matter of invoking the constitutional privilege against possible self-incrimination.

In *M. Anonymous* the inquiry was as to "alleged acts" of "professional misconduct" against a lawyer. A distance separates "professional misconduct" by a lawyer from crime. That was made clear in *People ex rel. Karlin v. Culkin* (248 N.Y. 470):

[fol. 150] "There are, however, many forms of professional misconduct that do not amount to crimes."

*M. Anonymous* was neither heard nor decided by this Court. There was no appeal there to this Court on the constitutional question *as a matter of right* pursuant to Civil Practice Act, Section 588, subdivision 1(a). Here, the appeal is *as of right*.

This Court's denial of the motion for leave to appeal in *M. Anonymous* would seem to import nothing on the question presented by this motion. No such leave was necessary if a substantial constitutional question was there present. This Court stated no reason for its denial of the leave there sought.

The fact that this Court did not state in *M. Anonymous* that an appeal lay *as a matter of right* likewise imports nothing on the question presented by this motion. I am advised by counsel that where leave is sought and the appeal lies *as a matter of right because of reversal or dissent* this Court indicates as the reason for denial of leave that the appeal lies *as a matter of right*. Not so, however, where, as in *M. Anonymous*, leave was sought to

appeal on the constitutional question. For then there still remains the question whether the constitutional question presented in the particular case is *substantial* and this Court would not prejudice that question by a *prior* statement that the appeal lies as of right.

Finally, the test for determining whether a substantial [fol. 151] constitutional question is presented so as to warrant a hearing and decision of it in this Court was thus stated in *Davega City Radio v. State Labor Relations Board* (281 N.Y. 13, 19, italics supplied):

"The appeal to this Court is taken as of right on the ground that a substantial constitutional question is involved, as will presently appear. The fact that we decide the constitutional question against appellant does not make it the less a ground for appeal. *No appellant should be required to insure that his answer to the constitutional question will be adopted by the court.*"

The motion to dismiss the appeal herein should be denied.

Howard Bluestein

Sworn to before me this 20th day of June, 1958.

Gertrude E. Maguire, Notary Public, State of New York,  
Qualified in Queens County, No. 41-7665300, Commission  
Expires March 30, 1960.

[fol. 152]

#### EXHIBIT TO AFFIDAVIT

The financial records of attorneys, physicians, public adjusters, insurance adjusters, collision repairmen and many others have been audited by our accountants. At the present time, the books of numerous other persons are being audited. Some attorneys have refused to produce any of their financial records and have made application to the courts to quash the subpoenas served upon them.

We regret exceedingly to be compelled to state that a sordid picture of unethical, unlawful and sometimes criminal practices by certain attorneys and persons acting in

concert with them has been developed. Unlawful patterns of solicitation of cases have involved collaboration between attorneys, doctors, auto body repairmen, insurance brokers and other persons. A great number of instances of collusion between attorneys and doctors to defraud insurance carriers by the issuance of forged or fraudulent and exaggerated medical certificates and medical bills have been uncovered. Similarly, a large number of cases involving false and exaggerated loss of earnings statements submitted to such carriers have been brought to light. Evidence has also been adduced with regard to widespread unlawful and unprofessional attempts to influence, and to corrupt employees and others associated with insurance carriers in the processing of liability claims. The evidence in the investigation to date, encompassing approximately 3,000 negligence cases, establishes frauds totalling many millions of dollars upon these carriers and their policyholders.

In the four intermediate reports to the Appellate Division alluded to, I have presented these facts in detail and, *inter alia*, made the following recommendations:

- (a) that disciplinary proceedings be instituted against all 14 attorneys thus far reported on;
- (b) that criminal proceedings be instituted against 10 of these attorneys;
- [fol. 153] (c) that criminal proceedings be instituted against 3 insurance company adjusters, 8 doctors, 3 auto body repairmen, 3 bail bondsmen, and 5 other persons of various occupations, all of whom acted in concert with the culpable attorneys in numerous unlawful acts;
- (d) that disciplinary proceedings be instituted before the New York State Board of Regents against 8 medical practitioners who acted in concert with these attorneys;
- (e) that the New York State Superintendent of Insurance be apprised of the facts pertaining to the acceptance of money, liquor and gifts in large quantities



by fifteen (15) employees, most of them supervisory personnel of 14 casualty companies, as well as the practice generally prevalent among employees and others associated with insurance companies of accepting gifts from persons with whom they should be dealing at arm's length.

- (f) that the Character Committees of the four Judicial Departments be alerted with respect to a prospective candidate for admission to the Bar, against whom evidence of unlawful conduct was presented.

Pursuant to the above recommendations, your Honorable Court has directed Mr. Hurley<sup>1</sup> to institute disciplinary proceedings against three (3) attorneys, and these disciplinary proceedings are now pending. Your Court has also permitted Mr. Hurley and me to refer the evidence adduced at the Additional Special Term regarding 10 attorneys to the District Attorney of Kings County for possible criminal prosecution as well as for mandatory disciplinary proceedings. The District Attorney has initiated disciplinary proceedings against two (2) of these attorneys. In addition, a Kings County Grand Jury has returned an indictment for grand larceny against another attorney. Furthermore, your Honorable Court has authorized Mr. Hurley and myself to refer the facts which have been elicited at the Additional Special Term concerning the activities of certain doctors to the State Board of Regents for proper action.

Between May 1, 1957 and date, 13,180 pages of testimony have been taken by the Official Reporters before the Additional Special Term. A total of 643 exhibits have been introduced in evidence, many of these exhibits being broken

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[fol. 154]

To be argued by Raphael H. Weissman

COURT OF APPEALS  
OF THE STATE OF NEW YORK

In the Matter of the Application of  
ANONYMOUS No. 7, Petitioner-Appellant,  
for an order pursuant to Article 78 C P A to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent-Respondent.

AFFIDAVIT OPPOSING MOTION TO DISMISS APPEAL

*(Oral argument is requested)*

State of New York,  
County of Kings, ss.:

NEAL PERCUDANI, being duly sworn, says:

I am the appellant herein. I make this affidavit in opposition to respondent's motion to dismiss my appeal.

Respondent takes the ground that my appeal does not raise a substantial constitutional question.

The moving papers attach a copy of my affidavit in support of the order to show cause signed by Chief Judge Conway herein (Exhibit "F". I asserverate (sic) the truth of the facts therein stated.

My said affidavit states the relevant facts and shows by reference to relevant authorities that my appeal presents a substantial constitutional question. I will not burden [fol. 155] the Court with a restatement of those matters here. I respectfully refer the Court to that affidavit as though fully again set forth herein.

This affidavit will treat only additional matters.

As further evidence of peril of criminal prosecution resulting from testimony given before Mr. Justice Arkwright, I refer this Court to a summary report of the activities of the Judicial Inquiry, made and filed by Mr. Justice Ark-

wright in the Appellate Division, Second Department, on June 11, 1958. I attach hereto photostatic copies of pages 5 and 6 of that report. The pertinent parts are indicated by red pencil. The underscoring is supplied.

The question presented by this motion is not precluded by *M. Anonymous v. Arkwright* (5 App. Div. 2d 790, leave to appeal denied by this Court on April 3, 1958).

The person there involved was a lawyer. Appellant is a layman. In view of the charge that a *prima facie* case of crime had already been made out against appellant before appellant was called to testify, appellant needed the guiding hand of counsel in the matter of invoking the constitutional privilege against possible self-incrimination.

In *M. Anonymous* the inquiry was as to "alleged acts" of "professional misconduct" against a lawyer. A distance separates "professional misconduct" by a lawyer from Crime. That was made clear in *People ex rel. Karlin v. Culkin* (248 N.Y. 470):

[fol. 156] "There are, however, many forms of professional misconduct that do not amount to crimes."

*M. Anonymous* was neither heard nor decided by this Court. There was no appeal there to this Court on the constitutional question *as a matter of right* pursuant to Civil Practice Act, Section 588, subdivision 1(a). Here, the appeal is *as of right*.

This Court's denial of the motion for leave to appeal in *M. Anonymous* would seem to import nothing on the question presented by this motion. No such leave was necessary if a substantial constitutional question was there present. This Court stated no reason for its denial of the leave there sought.

The fact that this Court did not state in *M. Anonymous* that an appeal lay *as a matter of right* likewise imports nothing on the question presented by this motion. I am advised by counsel that where leave is sought and the appeal lies *as a matter of right because or* (sic) *reversal or dissent* this Court indicates as the reason for denial of leave that the appeal lies *as a matter of right*. Not so, however, where, as in *M. Anonymous*, leave was sought to appeal on the con-

stitutional question. For then there still remains the question whether the constitutional question presented in the particular case is *substantial* and this Court would not prejudice that question by a *prior* statement that the appeal lies as of right.

Finally, the test for determining whether a substantial [fol. 157] constitutional question is presented so as to warrant a hearing and decision of it in this Court was thus stated in *Davega City Radio v. State Labor Relations Board* (281 N.Y. 13, 19, *italics supplied*):

"The appeal to this court is taken as of right on the ground that a substantial constitutional question is involved, as will presently appear. The fact that we decide the constitutional question against appellant does not make it the less a ground for appeal. *No appellant should be required to insure that his answer to the constitutional question will be adopted by the court.*"

The motion to dismiss the appeal herein should be denied.

Neal Percudani

Sworn to before me this 20th day of June, 1958.

Gertrude E. Maguire, Notary Public, State of New York  
Qualified in Queens County, No. 41-7665300, Commission  
Expires March 30, 1960.

[fol. 158]

#### EXHIBIT TO AFFIDAVIT

The financial records of attorneys, physicians, public adjusters, insurance adjusters, collision repairmen and many others have been audited by our accountants. At the present time, the books of numerous other persons are being audited. Some attorneys have refused to produce any of their financial records and have made application to the courts to quash the subpoenas served upon them.

We regret exceedingly to be compelled to state that a sordid picture of unethical, unlawful and sometimes criminal practices by certain attorneys and persons acting



in concert with them has been developed. Unlawful patterns of solicitation of cases have involved collaboration between attorneys, doctors, auto body repairmen, insurance brokers and other persons. A great number of instances of collusion between attorneys and doctors to defraud insurance carriers by the issuance of forged or fraudulent and exaggerated medical certificates and medical bills have been uncovered. Similarly, a large number of cases involving false and exaggerated loss of earnings statements submitted to such carriers have been brought to light. Evidence has also been adduced with regard to widespread unlawful and unprofessional attempts to influence and to corrupt employees and others associated with insurance carriers in the processing of liability claims. The evidence in the investigation to date, encompassing approximately 3,000 negligence cases, establishes frauds totalling many millions of dollars upon these carriers and their policyholders.

In the four intermediate reports to the Appellate Division alluded to, I have presented these facts in detail and, *inter alia*, made the following recommendations:

- (a) that disciplinary proceedings be instituted against all 14 attorneys thus far reported on;
- (b) that criminal proceedings be instituted against 10 of these attorneys;
- [fol. 159] (c) that criminal proceedings be instituted against 3 insurance company adjusters, 8 doctors, 3 auto body repairmen, 3 bail bondsmen, and 5 other persons of various occupations, all of whom acted in concert with the culpable attorneys in numerous unlawful acts;
- (d) that disciplinary proceedings be instituted before the New York State Board of Regents against 8 medical practitioners who acted in concert with these attorneys;
- (e) that the New York State Superintendent of Insurance be apprised of the facts pertaining to the acceptance of money, liquor and gifts in large quantities by fifteen (15) employees, most of them supervisory



personnel of 14 casualty companies, as well as the practice generally prevalent among employees and others associated with insurance companies of accepting gifts from persons with whom they should be dealing at arm's length.

- (f) that the Character Committees of the four Judicial Departments be alerted with respect to a prospective candidate for admission to the Bar, against whom evidence of unlawful conduct was presented.

Pursuant to the above recommendations, your Honorable Court has directed Mr. Hurley to institute disciplinary proceedings against three (3) attorneys, and these disciplinary proceedings are now pending. Your Court has also permitted Mr. Hurley and me to refer the evidence adduced at the Additional Special Term regarding 10 attorneys to the District Attorney of Kings County for possible criminal prosecution as well as for mandatory disciplinary proceedings. The District Attorney has initiated disciplinary proceedings against two (2) of these attorneys. In addition, a Kings County Grand Jury has returned an indictment for grand larceny against another attorney. Furthermore, your Honorable Court has authorized Mr. Hurley and myself to refer the facts which have been elicited at the Additional Special Term concerning the activities of certain doctors to the State Board of Regents for proper action.

Between May 1, 1957 and date, 13,180 pages of testimony have been taken by the Official Reporters before the Additional Special Term. A total of 643 exhibits have been introduced in evidence, many of these exhibits being broken

[fol. 160]

## IN COURT OF APPEALS OF NEW YORK

Present:

HON. ALBERT CONWAY,  
Chief Judge, Presiding.

---

In the Matter of the Application of

ANONYMOUS No. 6, Appellant,

for an Order pursuant to Article 78 C.P.A. to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,

AS JUSTICE OF THE SUPREME COURT, Respondent.

---

ORDER DISMISSING APPEAL—June 25, 1958

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and appeal dismissed upon the ground that no substantial constitutional question is involved.

Raymond J. Cannon, Clerk.

[fol. 161]

## IN COURT OF APPEALS OF NEW YORK

Present:

HON. ALBERT CONWAY,  
Chief Judge, Presiding.

---

In the Matter of the Application of  
ANONYMOUS No. 7, Appellant,  
for an Order pursuant to Article 78 C.P.A. to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

---

## ORDER DISMISSING APPEAL—June 25, 1958

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and appeal dismissed upon the ground that no substantial constitutional question is involved.

Raymond J. Cannon, Clerk.

[f. 162]

## IN COURT OF APPEALS OF NEW YORK

Present:

HON. ALBERT CONWAY,

Chief Judge, Presiding.

In the Matter of the Application of

ANONYMOUS No. 6, Appellant,

for an Order pursuant to Article 78 C.P.A. to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,

AS JUSTICE OF THE SUPREME COURT, Respondent.

## CLERK'S CERTIFICATE—September 10, 1958

I, Raymond J. Cannon, Clerk of the Court of Appeals, do hereby certify that in the above entitled motion made by the respondent to dismiss the appeal taken to this Court by the appellant which was submitted to the Court without oral argument on June 24th, 1958, the decision of the Court, handed down on June 25th, 1958, was as follows: "Motion granted and appeal dismissed upon the ground that no substantial constitutional question is involved"; that there was no dissent and no opinion or other memorandum.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this tenth day of September A.D., 1958.

Raymond J. Cannon, Clerk.

[fol. 163]

## IN COURT OF APPEALS OF NEW YORK

Present:

HON. ALBERT CONWAY,

Chief Judge, Presiding.

In the Matter of the Application of

ANONYMOUS No. 7, Appellant,

for an Order pursuant to Article 78 C.P.A. to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,

AS JUSTICE OF THE SUPREME COURT, Respondent.

CLERK'S CERTIFICATE—September 10, 1958

I, Raymond J. Cannon, Clerk of the Court of Appeals, do hereby certify that in the above entitled motion made by the respondent to dismiss the appeal taken to this Court by the appellant which was submitted to the Court without oral argument on June 24th, 1958, the decision of the Court, handed down on June 25th, 1958, was as follows: "Motion granted and appeal dismissed upon the ground that no substantial constitutional question is involved"; that there was no dissent and no opinion or other memorandum.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this tenth day of September A.D., 1958:

Raymond J. Cannon, Clerk.

[Seal]



[fol. 164]

COURT OF APPEALS  
OF THE STATE OF NEW YORK

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In the Matter of the Application of  
ANONYMOUS No. 6, Petitioner-Appellant,  
for an order pursuant to Article 78 CPA to review and  
annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent-Respondent.

---

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

I. Notice is hereby given that Howard Bluestein, the appellant above described as Anonymous No. 6, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, the appeal from the final order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determination and mandate made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the [fol. 165] Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging appellant guilty of a criminal contempt of court.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

Appellant was convicted of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of the justice presiding at the aforesaid Additional Special Term, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29); was sentenced to 30 days confinement, served two days and is presently enlarged on bail in the sum of \$2500.

II. The Clerk of the Court of Appeals will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. This notice of appeal to the Supreme Court of the United States.
2. Respondent's notice of motion to dismiss in the Court of Appeals, dated June 18, 1958.
3. The affidavit of Denis M. Hurley in support of the motion, sworn to June 18, 1958.
4. The Appellate Division order confirming the determination, dated May 26, 1958, and being Exhibit A, on the motion to dismiss.
- [fol. 166] 5. The order made by Mr. Justice Arkwright dated April 24, 1958, being Exhibit B, on the motion to dismiss.
6. The commitment made by Mr. Justice Arkwright, dated April 24, 1958, being Exhibit C, attached to the moving papers in the Court of Appeals.
7. The notice of appeal to the Court of Appeals, dated May 27, 1958, being Exhibit D, attached to the moving papers in the Court of Appeals.
8. The order to show cause made by Chief Judge Conway on June 10, 1958, being Exhibit E, attached to the moving papers.
9. The affidavit of appellant, sworn to May 29, 1958, being Exhibit F, on the motion to dismiss.

10. The Appellate Division order dated January 21, 1958, being Exhibit G, on the motion to dismiss.
11. A copy of the transcript, certified April 30, 1958, being Exhibit H, on the motion to dismiss.
12. Respondent's answer and return, being Exhibit I, on the motion to dismiss.
13. Appellant's opposing affidavit, sworn to June 20, 1958, and the exhibit thereto attached, consisting of pages 5 and 6 of Mr. Justice Arkwright's Report.
14. The order of the Court of Appeals, dated June 25, 1958, dismissing the appeal.
15. The memorandum decision of the Court of Appeals, dated June 25, 1958, dismissing the appeal.

III. The following question is presented by this appeal:

Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29), in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an [fol. 167] attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in this case, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellant who is not an attorney at law and who had been told before his questioning by a member of the inquiry staff that evidence of a prima facie case of crime had already been gathered against him and was ready to be sent to the District Attorney for prosecution and who nevertheless was denied the presence of his counsel in the courtroom during the questioning as a result of which appellant refused to answer the questions aforesaid?

Dated, Brooklyn, New York,  
July 23rd, 1958.

Raphael H. Weissman, Attorney for Howard Blue-  
stein, Appellant, Office & P. O. Address, 185  
Montague Street, Brooklyn 1, New York.

To: Hon. Raymond J. Cannon, Clerk of the Court of  
Appeals, Court of Appeals Hall, Eagle and Pine Streets,  
Albany 1, New York.

Denis M. Hurley, Esq., Attorney for Hon. George A.  
Arkwright, Respondent, Office & P. O. Address, Room 301,  
Borough Hall, Brooklyn 1, New York.

[fol. 168]

**COURT OF APPEALS  
OF THE STATE OF NEW YORK**

In the Matter of the Application of  
**ANONYMOUS No. 7, Petitioner-Appellant,**  
for an order pursuant to Article 78 CPA to review and  
annul the determination and mandate of the

**HONORABLE GEORGE A. ARKWRIGHT,**  
**AS JUSTICE OF THE SUPREME COURT, Respondent-Respondent.**

**NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES**

I. Notice is hereby given that Neal Percudani, the  
appellant above described as Anonymous No. 7, hereby ap-  
peals to the Supreme Court of the United States from the  
final order of the Court of Appeals of the State of New  
York, dated and entered in the office of the Clerk of said  
Court of Appeals on June 25, 1958, dismissing, upon the  
ground that no substantial constitutional question is in-  
volved, the appeal from the final order of the Appellate  
Division of the Supreme Court of the State of New York,  
Second Department, dated and entered in the Appellate  
Division Clerk's office on May 26, 1958, which confirmed  
the determination and mandate made at the Additional  
Special Term, Kings County (for a Judicial Inquiry by

the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the [fol. 169] Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging appellant guilty of a criminal contempt of court.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

Appellant was convicted of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of the justice presiding at the aforesaid Additional Special Term, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29); was sentenced to 30 days confinement, served two days and is presently enlarged on bail in the sum of \$2500.

II. The Clerk of the Court of Appeals will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:-

1. This notice of appeal to the Supreme Court of the United States.
2. Respondent's notice of motion to dismiss in the Court of Appeals, dated June 18, 1958.
3. The affidavit of Denis M. Hurley in support of the motion, sworn to June 18, 1958.
4. The Appellate Division order confirming the determination, dated May 26, 1958, and being Exhibit A; on the motion to dismiss.
- [fol. 170] 5. The order made by Mr. Justice Arkwright, dated April 24, 1958, being Exhibit B, on the motion to dismiss.
6. The commitment made by Mr. Justice Arkwright, dated April 24, 1958, being Exhibit C, attached to the moving papers in the Court of Appeals.



7. The notice of appeal to the Court of Appeals, dated May 27, 1958, being Exhibit D, attached to the moving papers in the Court of Appeals.
8. The order to show cause made by Chief Judge Conway on June 10, 1958, being Exhibit E, attached to the moving papers.
9. The affidavit of appellant, sworn to May 29, 1958, being Exhibit F, on the motion to dismiss.
10. The Appellate Division order dated January 21, 1958, being Exhibit G, on the motion to dismiss.
11. A copy of the transcript, certified April 30, 1958, being Exhibit H, on the motion to dismiss.
12. Respondent's answer and return, being Exhibit I, on the motion to dismiss.
13. Appellant's opposing affidavit, sworn to June 20, 1958, and the exhibit thereto attached, consisting of pages 5 and 6 of Mr. Justice Arkwright's Report.
14. The order of the Court of Appeals, dated June 25, 1958, dismissing the appeal.
15. The memorandum decision of the Court of Appeals, dated June 25, 1958, dismissing the appeal.

III. The following question is presented by this appeal:

Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29), in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an [fol. 171] attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in this case, is unconstitutional in that it denied Fourteenth Amendment United States Constitution, due process of law to appellant who is not an attorney at law and who had been told before his questioning by a member of the inquiry staff that

evidence of a prima facie case of crime had already been gathered against him and was ready to be sent to the District Attorney for prosecution and who nevertheless was denied the presence of his counsel in the courtroom during the questioning as a result of which appellant refused to answer the questions aforesaid?

Dated, Brooklyn, New York,  
July 23, 1958.

Raphael H. Weissman, Attorney for Neal Percudani,  
Appellant, Office & P. O. Address, 185 Montague  
Street, Brooklyn 1, New York.

To: Hon. Raymond J. Cannon, Clerk of the Court of  
Appeals, Court of Appeals Hall, Eagle and Pine Streets,  
Albany 1, New York,

Denis M. Hurley, Esq., Attorney for Hon. George A.  
Arkwright, Respondent, Office & P. O. Address, Room 301,  
Borough Hall, Brooklyn 1, New York.

[fol. 172]

**SUPREME COURT  
OF THE STATE OF NEW YORK**  
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of  
ANONYMOUS No. 6, Petitioner

for an order pursuant to Article 78 of the Civil Practice Act,  
to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES—Filed July 24, 1958

I. Notice is hereby given that Howard Bluestein, the  
petitioner above described as Anonymous No. 6, hereby ap-

peals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, the appeal from the final order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determination and mandate made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of [fol. 173] Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging appellant guilty of a criminal contempt of court.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

Appellant was convicted of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of the justice presiding at the aforesaid Additional Special Term, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29); was sentenced to 30 days confinement, served two days and is presently enlarged on bail in the sum of \$2500.

II. The Clerk of the Appellate Division will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. This notice of appeal to the Supreme Court of the United States.
2. The order to show cause made by Mr. Justice Murphy on April 26, 1958.
3. The petition upon which the order is based, sworn to April 25, 1958, without the attached exhibits.

4. The memorandum decision of the Appellate Division, dated May 26, 1958, confirming the determination.

III. The following question is presented by this appeal:

[fol. 174] Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29), in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in this case, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellant who is not an attorney at law and who had been told before his questioning by a member of the inquiry staff that evidence of a prima facie case of crime had already been gathered against him and was ready to be sent to the District Attorney for prosecution and who nevertheless was denied the presence of his counsel in the courtroom during the questioning as a result of which appellant refused to answer the questions aforesaid?

A notice of appeal to the Supreme Court of the United States is also being served upon the Clerk of the Court of Appeals. This notice is served upon the Clerk of the Appellate Division because the Appellate Division is possessed of the above described part of the record required for review by the United States Supreme Court.

Dated, Brooklyn, New York,  
July 23rd, 1958.

Raphael H. Weissman, Attorney for Howard Blue-  
stein, Appellant, Office & P. O. Address, 185 Mon-  
tague Street, Brooklyn 1, New York.

To: Hon. John J. Callahan, Clerk of the Appellant (sic)  
Division, Second Department, 45 Monroe Place, Brooklyn  
1, New York,

Denis M. Hurley, Esq., Attorney for Hon. George A.  
Arkwright, Respondent, Office & P.O. Address, Room 301,  
Borough Hall, Brooklyn 1, New York.



[fol. 175]

SUPREME COURT  
OF THE STATE OF NEW YORK  
APPELLATE DIVISION—SECOND DEPARTMENT

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In the Matter of the Application of

ANONYMOUS No. 7, Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act,  
to review and annul the determination and mandate of the

HONORABLE GEORGE A. ARKWRIGHT,  
AS JUSTICE OF THE SUPREME COURT, Respondent.

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NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES—Filed July 24, 1958

I. Notice is hereby given that Neal Percudani, the petitioner above described as Anonymous No. 7, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, the appeal from the final order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determination and mandate made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings), [fol. 176] dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging appellant guilty of a criminal contempt of court.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

Appellant was convicted of a criminal contempt of court for refusing, after being sworn and in the immediate view



and presence of the justice presiding at the aforesaid Additional Special Term, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29); was sentenced to 30 days confinement, served two days and is presently enlarged on bail in the sum of \$2500.

II. The Clerk of the Appellate Division will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. This notice of appeal to the Supreme Court of the United States.
2. The order to show cause made by Mr. Justice Murphy on April 26, 1958.
3. The petition upon which the order is based, sworn to April 25, 1958, without the attached exhibits.
4. The memorandum decision of the Appellate Division, dated May 26, 1958, confirming the determination.

III. The following question is presented by this appeal:

[fol. 177] Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Annotated, Book 29), in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in this case, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellant who is not an attorney at law and who had been told before his questioning by a member of the inquiry staff that evidence of a prima facie case of crime had already been gathered against him and was ready to be sent to the District Attorney for prosecution and who nevertheless was denied the presence of his counsel in the courtroom during the ques-

tioning as a result of which appellant refused to answer the questions aforesaid?

A notice of appeal to the Supreme Court of the United States is also being served upon the Clerk of the Court of Appeals. This notice is served upon the Clerk of the Appellate Division because the Appellate Division is possessed of the above described part of the record required for review by the United States Supreme Court.

Dated, Brooklyn, New York,  
July 23, 1958.

Raphael H. Weissman, Attorney for Neal Percudani,  
Appellant, Office & P. O. Address, 185 Montague  
Street, Brooklyn 1, New York.

To: Hon. John J. Callahan, Clerk of the Appellate Division, Second Department, 45 Monroe Place, Brooklyn 1, New York,

Denis M. Hurley, Esq., Attorney for Hon. George A. Arkwright, Respondent, Office & P. O. Address, Room 301, Borough Hall, Brooklyn 1, New York.

[fol. 178]

SUPREME COURT OF THE UNITED STATES

No. 378—October Term, 1958

ANONYMOUS NOS. 6 AND 7, Appellants,

VS.

HON. GEORGE A. ARKWRIGHT, AS JUSTICE OF THE  
SUPREME COURT OF THE STATE OF NEW YORK.

ORDER POSTPONING JURISDICTION—November 17, 1958

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

November 17, 1958

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**FILED**

**SEP 18 1958**

**JAMES R. BROWNING, Clerk**

**IN THE**  
**Supreme Court of the United States**

**October Term, 1958**

**No. 378**

**ANONYMOUS NOS. 6 AND 7,**

*Appellants,*

**v,**

**HON. GEORGE A. ARKWRIGHT, as Justice of the**  
**Supreme Court of the State of New York,**

*Appellee.*

**ON APPEAL FROM THE COURT OF APPEALS OF THE**  
**STATE OF NEW YORK**

**JURISDICTIONAL STATEMENT**

**RAPHAEL H. WEISSMAN,**  
*Attorney and Counsel for Appellants,*  
**Office and P. O. Address,**  
**185 Montague Street,**  
**Brooklyn 1, New York.**

## TABLE OF CONTENTS

	PAGE
Opinions Below .....	2
Jurisdiction .....	2
Statute Involved .....	5
Questions Presented .....	5
Statement .....	6
The Questions Are Substantial and Important .....	10
<b>APPENDIX A—TEXTS OF OFFICIAL REPORTS OF MEMORANDA DECISIONS:</b>	
Appellate Division Decisions Herein Reported, 6 A. D. 2d 719 (2 and 3) .....	21
Court of Appeals Decisions Herein .....	22
Appellate Division Decision in the Companion Case Reported in 5 A. D. 2d 790-791 .....	23
Court of Appeals Decision in the Companion Case Reported in 4 N. Y. 2d 676 .....	25
<b>APPENDIX B—COPIES OF THE DETERMINATIONS AND MANDATES OF THE ADDITIONAL SPECIAL TERM AND THE FINAL ORDER OF THE APPELLATE DIVISION AND OF THE COURT OF APPEALS:</b>	
Contempt Order—Howard Bluestein .....	26
Commitment—Howard Bluestein .....	30
Order Confirming Determination .....	35
Order Dismissing Appeal .....	37
Contempt Order—Neal Percudani .....	38
Commitment—Neal Percudani .....	43
Order Confirming Determination .....	48
Order Dismissing Appeal .....	50

**Cases Cited**

Anonymous (M.), v. Arkwright, Matter of, 5 A. D. 790, leave to appeal denied, 4 N. Y. 2d 676 .....	6, 10
Cicena v. La Gay, 357 U. S. 504 .....	17
Crooker v. California, 357 U. S. 433 .....	17
Matter of Groban, 352 U. S. 330 .....	4, 10
People ex rel. Karlin v. Culkin, 248 N. Y. 465 .....	13
Tumey v. Ohio, 273 U. S. 510 .....	4

**Statutes Cited**

28 U. S. C.:	
Section 1257 (2) .....	4
Section 2103 .....	4
Judiciary Law, Section 750, Subdivision 5 .....	12

**Text Cited**

McKinney's Consolidated Laws of New York, Annotated, Book 29, Sec. 90 .....	5
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IN THE

# Supreme Court of the United States

October Term, 1958

No.

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ANONYMOUS Nos. 6 and 7,

*Appellants,*

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme  
Court of the State of New York,

*Appellee.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## JURISDICTIONAL STATEMENT

Appellants Howard Bluestein (described above as Anonymous No. 6) and Neal Percudani (described above as Anonymous No. 7) appeal from the final orders of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, their appeals taken on constitutional grounds from final orders of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determinations and mandates made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal,

Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-law, and by Others Acting in Concert with Them, in the County of Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging each appellant guilty of a criminal contempt of court and appellants submit this statement to show that the Supreme Court of the United States has jurisdiction and that substantial and important constitutional questions are presented respecting the right to representation by counsel.

### Opinions Below

The memoranda decisions of the Court of Appeals of the State of New York are reported in 4 N. Y. 2d 1034. The Memoranda decisions of the Appellate Division of the Supreme Court of the State of New York, Second Department, are reported in 6 A. D. 2d 719 (2 and 3). These, and the memoranda decisions in the companion case of *Matter of Anonymous (M.) v. Arkwright*, 5 A. D. 790, motion for leave to appeal denied; 4 N. Y. 676, are appended hereto. There are also appended hereto copies of the determinations and mandates of the Additional Special Term and the final orders of the Appellate Division and the Court of Appeals.

### Jurisdiction

These were original petitions in the Appellate Division to review the determinations and mandates made at the Additional Special Term (Judicial Inquiry), convicting each appellant of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of Mr. Justice Arkwright, the appellee, a justice of the Supreme Court, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State

of New York (McKinney's Consolidated Laws of New York, Book 29). Each appellant was sentenced to thirty days imprisonment. Each served two days and is presently enlarged on bail in the sum of \$2500. "Such" determinations and mandates are "reviewable by a proceeding under article seventy-eight of the civil practice act", Section 752, Judiciary Law. Section 1287 of Article 78 of the Civil Practice Act (Gilbert-Bliss, Civil Practice Act of New York), provides that if the petition be directed against a justice of the Supreme Court, the application shall be made to the Appellate Division in the first instance.

The petitions made the claim that appellants were denied Fourteenth Amendment, United States Constitution, due process of law, in that they were denied the presence of their counsel in the hearing room during the questioning.

Relying upon the companion case of *Matter of Anonymous (M.) v. Arkwright* (5 A. D. 790, leave to appeal denied, 4 N. Y. 2d 676), the Appellate Division confirmed the determinations and mandates of the appellee.

In the companion case, the right to exclude counsel from the hearing room during questioning was expressly based by the Appellate Division on its construction of Section 90, subdivision 10, of the Judiciary Law. The Judicial Inquiry was conducted by order of the Appellate Division. In the companion case, the Appellate Division wrote (5 A. D. 2d 790):

"The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); \* \* \*'"

Thereupon, appellants appealed as of right to the Court of Appeals of the State of New York, the highest state court. Their appeals were taken pursuant to the

provisions of Section 588, subdivision 1, (a), Civil Practice Act, which allows an appeal as of right where a federal constitutional question is involved.

By the orders dated and entered in the office of the Clerk of the Court of Appeals on June 25, 1958, that court on appellee's motion dismissed the appeals, expressly, "upon the ground that no substantial constitutional question is involved".

Each appellant filed a notice of appeal herein with the Clerk of the Court of Appeals on July 25, 1958.

Each appellant also filed a notice of appeal herein with the Clerk of the Appellate Division, Second Department, on July 24, 1958, because the latter is possessed of part of the record required for review by this Court.

The jurisdiction of this Court to review these cases by direct appeal is invoked under 28 U. S. C., Section 1257(2).

Failing that, appellants invoke this Court to treat the papers as applications for writs of certiorari under 28 U. S. C., Section 2103.

*Tumey v. Ohio*, 273 U. S. 510, and *Matthews v. Huwe*, 269 U. S. 262, sustain the jurisdiction of this Court, in that the Court of Appeals orders dismissing the appeals, being grounded upon the absence of a debatable constitutional question, are in effect affirmances on the merits.

*Matter of Groban*, 352 U. S. 330, sustains the jurisdiction of this Court by direct appeal, in that the denial of counsel was based upon the application of subdivision 10, Section 90, Judiciary Law.

## Statute Involved

Subdivision 10, Section 90, Judiciary Law of the State of New York, which may be found in McKinney's Consolidated Laws of New York, Annotated, Book 29, reads, as follows:

*"SEC. 90. Admission to and removal from practice by appellate division*

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

## Questions Presented

Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York, in so far as it provides that "any inquiry, investigation or proceeding relating to



the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in these cases, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellants who are not attorneys at law and who had been told before their questioning by a member of the Inquiry staff that evidence of a prima facie case of crime had already been gathered and was ready to be sent to the District Attorney for prosecution and who nevertheless were denied the presence of their counsel in the courtroom during the questioning as a result of which the appellants refused to answer certain questions?

Whether the judgments on appeal in the circumstances stated in the previous question denied to appellants such due process?

### Statement

The Judicial Inquiry was conducted by Mr. Justice Arkwright under an order made by the Appellate Division. The scope of the inquiry and the main provisions of the order were thus summarized by the Appellate Division in the companion case (5 A. D. 2d 790-791):

"By an order of this court dated January 21, 1957, as amended by subsequent order dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices 'involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them' and with 'respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them.' The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and pro-

vided that the inquiry and investigation shall be conducted by a named Justice of the Supreme Court, 'with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records'. An attorney nominated by the Brooklyn Bar Association was designated to aid said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court' and 'that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.' "

What is done with the evidence adduced at the Judicial Inquiry was thus described in Mr. Justice Arkwright's report to the Appellate Division on June 11, 1958, at page 6:

"Your Court has also permitted Mr. Hurley and me to refer the evidence adduced at the Additional Special Term regarding 10 attorneys to the District Attorney of Kings County for possible criminal prosecution as well as for mandatory disciplinary proceedings. The District Attorney has initiated disciplinary proceedings against two (2) of these attorneys. In addition, a Kings County Grand Jury has returned an indictment for grand larceny against another attorney. Furthermore, your Honorable Court has authorized Mr. Hurley and myself to refer the facts which have been elicited at the Additional Special Term concerning the activities of certain doctors to the State Board of Regents for proper action."

Appellants were subpoenaed to appear and testify at the Judicial Inquiry. Failure to appear or testify is punishable as a contempt of court.

Appellants are not attorneys-at-law. They are licensed private detectives and investigators. They do business as partners under the trade name of Gotham Claims Service.

Appellants repeatedly protested to Mr. Justice Arkwright that they were being questioned as persons themselves accused of crime, not as mere witnesses, and that the accusation had been made by a member of the staff of the Judicial Inquiry. See transcript of testimony, pages 21, 22, 23, 33, 42, 46.

Mr. Justice Arkwright held a hearing on this. Here is the text of the admissions of the staff member in question, as shown upon the transcript of the testimony at pages 92-94, with italics supplied:

*"By the Court:*

Q. You heard what was said. Do you wish to say anything? A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but *I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from defendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak*

*to them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.*

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

*I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.*

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done."

Facing such imminent peril of prosecution for crime, appellants requested that their counsel be permitted in the courtroom during the questioning.

As to each appellant, the Appellate Division found that: "Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation," 6 A. D. 2d 719.

Appellant's attorney made it clear to Mr. Justice Arkwright that the claim to the right of counsel during ques-



tioning was made "under the due process clause of the Fourteenth Amendment." See transcript of testimony, page 49.

The same claim was made by each appellant in his petition to the Appellate Division to review the determinations and mandates made by Mr. Justice Arkwright. See paragraph 8 of each petition.

In the companion case, the Appellate Division had rested its approval of Mr. Justice Arkwright's exclusion of counsel squarely on its application of subdivision 10, Section 90, Judiciary Law, which provides that any such inquiry shall be "private and confidential," 5 A. D. 2d 790. In his answer to the petition in the Appellate Division of each appellant herein Mr. Justice Arkwright stated that he excluded counsel from the hearing room during questioning in order to maintain that "privacy". See paragraph Tenth of Mr. Justice Arkwright's answer to each petition. As to each appellant, the Appellate Division held that the companion case was conclusive, and wrote, 6 A. D. 2d 719:

"Petitioner contends that special facts distinguish this proceeding from *Matter of Anonymous (M.) v. Arkwright* (5 A. D. 2d 790, motion for leave to appeal denied 4 N. Y. 2d 676) and *Matter of Anonymous (S.) v. Arkwright* (5 A. D. 2d 792) in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney. Determination unanimously confirmed, without costs."

### **The Questions Are Substantial and Important**

The judgments on appeal were based upon a misapprehension of the reach of this Court's decision in *Matter of Groban*, 352 U. S. 330.



In the companion case the Appellate Division relied upon *Groban*, 5 A. D. 2d 790, 791, and decided the instant cases upon the authority of the companion case, 6 A. D. 2d 719. The other case cited by the Appellate Division from 5 A. D. 2d 792, has no bearing upon the questions herein presented. There the Appellate Division reversed the contempt upon another ground.

In *Groban*, this Court held that a statute permitting a state fire marshal to conduct private investigation to determine causes of fire, insofar as it authorizes exclusion of counsel while witness testifies, is not repugnant to due process.

There were three opinions in *Groban*: a majority opinion of three written by Mr. Justice Reed; a concurring opinion by Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined; and a dissent by Mr. Justice Black, with whom the Chief Justice and Justices Douglas and Brennan joined.

There are several significant grounds upon which the instant cases differ from the majority opinion.

Mr. Justice Reed wrote (p. 333):

"The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts to support such belief, does not bar the taking of testimony in a private investigatory proceeding."

In the instant cases it is not a matter of "suspicion" only by the authorities and not a mere "belief" by appellants without allegations of fact to support it. Here it stands admitted on the record that before appellants were questioned they had been told by a member of the Inquiry staff that sufficient evidence had already been gathered against them of a *prima facie* case of crime that was ready to be sent to the District Attorney.

Mr. Justice Reed further wrote (334):

"Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention."

There is here no such attendant urgency as that involved in investigating the cause of a fire. This inquiry is conducted by a Justice of the Supreme Court in the calm atmosphere and with all the paraphernalia of a courtroom and with a large staff of counsel on one side. The power exercised here is not administrative, but judicial. The punishment here was meted out by a "court" for "refusal \* \* \* ; after being sworn, to answer any legal and proper interrogatory". See Judiciary Law, Section 750, subdivision 5. A court is the one place in the world where a person accused should not be denied counsel.

Mr. Justice Reed further wrote (p. 334):

"As in similar situations abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained."

Here there would be no possibility of correcting any such abuse. Here the evidence is taken by a "court". There is no conceivable basis upon which evidence so taken may be excluded from subsequent prosecutions. Unless the parties have the guiding hand of counsel at the time the evidence is first given, they are forever deprived of correcting any abuse that may be involved.

Finally, Mr. Justice Reed wrote (p. 334):

"Ohio, like many other States, maintains a division of the state government directed by the Fire Marshal for the prevention of fires and reduction of fire losses. Section 3737.13, which has been in effect since 1900, represents a determination by the Ohio Legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long

run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy."

No such possibility exists here. Counsel for persons questioned here would be in a "court", subject to all restraints and disciplines that a court can impose. Indeed the order for the Inquiry here did not exclude the presence of counsel for persons questioned in all cases. In the companion case, 5 A. D. 2d 790, the Appellate Division wrote (p. 791):

"In its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct."

The question here, therefore, is not one of the presence of counsel to the person examined encumbering the proceeding so as to make it unworkable or unwieldy. The presence of such counsel in exceptional cases was envisioned in the order itself.

The question here is whether the presence of such counsel is a matter of constitutional right or of mere "discretion". In the companion case the Appellate Division wrote that the person examined was himself the subject of inquiry as to his own alleged "acts of professional misconduct". A distance separates "professional misconduct" by a lawyer from crime. *People ex rel. Karlin v. Culkin*, 248 N. Y. 465. In the cited case, Chief Judge Cardozo wrote (p. 470):

"The precise question to be determined is whether there is power in the Appellate Division to direct a general inquiry into the conduct of its own

officers, the members of the bar, and in the course of that inquiry to compel one of those officers to testify as to his acts in his professional relations. The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes."

Here, appellants were asked to testify after they had already been informed by a member of the Inquiry staff that a *prima facie* case of crime had already been established against them and was ready to be sent to the District Attorney for prosecution. Here, the presence of their counsel during the questioning was a constitutional right of due process.

The instant cases also differ from the concurring opinion in *Groban*.

Mr. Justice Frankfurter there wrote that the Ohio statute was not directed to the "examination of suspects" (p. 336). Here, before the examination, the appellants had already been accused of crime. Mr. Justice Frankfurter further wrote that in *Groban* there was an "administrative inquiry \* \* \* *in camera*" (p. 336). Here there was a judicial inquiry in court. Lastly, Mr. Justice Frankfurter wrote (p. 337):

"The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Here there are differences from *Groban* and they are vital and should be recognized so as to accord to appellants due process.

The four dissenters in *Groban* were of opinion that even on the facts of that case there was a denial of due process. They thought that even *Groban* (p. 338)

"disregards 'this nation's historic distrust of secret proceedings' and decides contrary to the general principle laid down by this Court in one of its landmark decisions that an accused " \* \* \* requires the guiding hand of counsel at every step in the proceedings against him'."

Descending to the particulars of the *Groban* case, Mr. Justice Black wrote (p. 344):

"I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him. The broader implications of these decisions seem to me to support appellants' right to use their counsel when questioned by the Deputy Fire Marshal. It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. It is quite possible that the conviction of a person charged with arson or a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination."

Then, answering a suggestion that the privilege against self-incrimination is ample protection, he wrote (pp. 345-346):

"The average witness has little if any idea when or how to raise any of his constitutional privileges."



There is no requirement in the Ohio statutes that the fire-prevention officers must inform the witness that he is privileged not to incriminate himself. And in view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it. If the witness is coerced or misled by his interrogators he may not dare to raise the privilege. Undoubtedly he will be made aware that hanging over his head at all times is the officer's power to punish him for contempt—a power whose limitations the witness will not understand.”

Answering a suggestion that grand jury procedure is relevant, he further wrote (pp. 346-347):

“But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.”

Mr. Justice Black concluded thus (p. 353):

“Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of ‘statements’ by one means or another from an individual by officers of the state while he is held incommunicado.”

Two more cases on the right to counsel decided by this Court at end of term require comment.

*Crooker v. California*, 357 U. S. 433, and *Cicena v. La Gay*, 357 U. S. 504, held that the bare fact of refusal by state authorities to honor a request to confer with counsel about to be retained or already retained during a period of police interrogation is of itself no violation of due process. There was division in both, five to four and five to three, Mr. Justice Brennan abstaining in the latter.

These cases also do not reach the questions presented by the instant cases.

In *Cicena*, this Court held that the claim of right to confer with counsel there had been "disposed of by *Crooker*" 357 U. S. 508.

In *Crooker*, the questions presented were thus stated by this Court (p. 434):

"Petitioner, under sentence of death for murder of his paramour, claims that his conviction in a California court violates Fourteenth Amendment due process of law because (1) the confession admitted into evidence over his objection had been coerced from him by state authorities, and (2) even if his confession was voluntary it occurred while he was without counsel because of the previous denial of his request therefor."

This Court there found that the confession was "voluntary" (p. 438). The Court pointed to the evidence that (p. 437):

"Before being transferred to the West Los Angeles Police Station he was advised by a police lieutenant, 'you don't have to say anything that you don't want to,' \* \* \*."

Then this Court there disposed of the second contention (p. 439):

"that the use of any confession obtained from him during the time of such denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner fails to sustain the first point, and therefore we do not reach the second."

In other words, this Court there held that such denial of counsel may be an element of coercion which may be shown at the trial in impeachment of the voluntariness of the confession.

In both respects the instant cases differ from the last cited cases. Here the evidence was not to be "voluntary". Appellants were under coercion of subpoena on pain of contempt to give their evidence. Here, moreover, there would be no way of correcting any abuse of their rights at a subsequent prosecution. The evidence, it has already been shown, would be taken by a "court" and unless appellants have the guiding hand of counsel at the time the evidence is first given, they would forever be deprived of correcting any abuse that may be involved.

The instant cases fall squarely within the following portion of this Court's opinion in *Crooker* (p. 439):

"Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler v. Fretag, supra*, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'."

The questions presented by the instant appellants are substantial.

They are also important. The right to employ counsel in criminal cases has a "high place" in our scheme of

procedural safeguards. *Cicenia*, page 509. As this Court further wrote in *Crooker* (p. 434):

“Certiorari was granted because of the serious due process implications that attend state denial of a request to employ an attorney.”

The instant cases should be heard and decided on the merits.

Respectfully submitted,

RAPHAEL H. WEISSMAN,

Attorney and Counsel for Appellants,

Office & P. O. Address,

185 Montague Street,

Brooklyn 1, New York.

## APPENDIX A

### Texts of Official Reports of Memoranda Decisions

#### Appellate Division Decisions Herein Reported 6 A D 2d 719 (2 and 3)

2 In the Matter of ANONYMOUS No. 6, Petitioner, against GEORGE A. ARKWRIGHT, as Justice of the Supreme Court, Respondent.—Proceeding to review a determination adjudging petitioner, a licensed private detective and investigator, guilty of a criminal contempt for refusing to answer questions at a judicial inquiry, and imposing punishment. Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation. Petitioner contends that special facts distinguish this proceeding from *Matter of Anonymous (M.) v. Arkwright* (5 A D 2d 790, motion for leave to appeal denied 4 N Y 2d 676) and *Matter of Anonymous (S.) v. Arkwright* (5 A D 2d 792) in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney. Determination unanimously confirmed, without costs. No opinion. Present—Nolan, P. J., Wenzel, Beldock, Ughetta and Hallinan, JJ.

3 In the Matter of ANONYMOUS No. 7, Petitioner, against GEORGE A. ARKWRIGHT, as Justice of the Supreme Court, Respondent.—Proceeding to review a determination adjudging petitioner, a licensed private detective and investigator, guilty of a criminal contempt for refusing to answer questions at a judicial inquiry, and imposing pun-



*Appellate Division Decisions Herein Reported*  
*6 A. D. 2d 719 (2 and 3)*

ishment. Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation. Petitioner contends that special facts distinguish this proceeding from *Matter of Anonymous v. Arkwright* (5 A D 2d 790) and *Matter of Anonymous v. Arkwright* (5 A D 2d 792, motion for leave to appeal denied in both proceedings 4 N Y 2d 676) in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney. Determination unanimously confirmed, without costs. No opinion. Present—Nolan, P. J., Wenzel, Beldock, Ughetta and Hallinan, JJ.

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**Court of Appeals Decisions Herein**

Note: Counsel is informed that the official reports of the Court of Appeals decisions herein will be found in 4 N Y 2d 1034.

At this writing, the text of the official report is not yet available for copy. The decisions themselves are included in the certified transcript made up by the Clerk of the Court of Appeals and filed in this Court.

**Appellate Division Decision in the Companion Case  
Reported in 5 A D 2d 790-791**

8 In the Matter of M. ANONYMOUS, Petitioner against GEORGE A. ARKWRIGHT, as Justice of the Supreme Court of the State of New York, Respondent.—By an order of this court dated January 21, 1957, as amended by subsequent order dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices “involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them” and with “respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them”. The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and provided that the inquiry and investigation shall be conducted by a named Justice of the Supreme Court, “with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records”. An attorney nominated by the Brooklyn Bar Association was designated to aid the said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that “for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court” and

*Appellate Division Decision in the Companion Case  
Reported in 5 A. D. 2d 790-791*

"that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations." On or about July 19, 1957 petitioner submitted to this court his resignation as an attorney and counsellor-at-law, but no order has been entered upon his purported resignation. Pursuant to subpoena, petitioner attended at the additional Special Term, was sworn and refused to answer certain questions. By this proceeding pursuant to article 78 of the Civil Practice Act, petitioner seeks to review the order of the additional Special Term adjudging him guilty of contempt and fining him \$250. No issue is raised as to whether the review of the contempt order by an article 78 proceeding is proper. Determination unanimously confirmed, without costs. The fine provided for in the order is to be paid within 30 days from the entry of the order hereon. Petitioner challenges the power and jurisdiction of the Appellate Division to make the order, and the power and jurisdiction of the additional Special Term to conduct the investigation as to him, as he had resigned from the Bar. He did not refuse to answer on the ground that his answers might tend to incriminate him. He reserved the alleged constitutional rights to refuse to answer questions (N. Y. Const., art. I, §§ 6, 12; U. S. Const., 4th, 5th Amdts.) and based his refusal to answer on the ground that the additional Special Term excluded his attorney while he was being questioned. It was within the power and jurisdiction of this court to make the order directing the inquiry and investigation (N. Y. Const., art. VI, § 2; Judiciary Law, §§ 86, 90; *Matter of Bar Assn. of City of N. Y.*, 222 App. Div. 580; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149; *People ex rel. Karlin v. Culkin*, 248 N. Y. 465), and petitioner was required to answer questions as to his conduct as an attorney, subject to his right to refuse to answer such questions if his answers would expose him to punishment for crime. In

*Appellate Division Decision in the Companion Case  
Reported in 5 A. D. 2d 790-791*

its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct. But the result of the inquiry and investigation as to petitioner would be merely a report and recommendation as to future action, and would not be a final determination as to him. It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, § 90). Section 73 of the Civil Rights Law is not applicable to this inquiry and investigation. Since petitioner based his refusal to answer on invalid grounds, he was properly found guilty of contempt (*People v. Berson*, 308 N. Y. 918). A person is not absolved of willful wrong-doing because he relied on his attorney's advice (*People v. Marcus*, 261 N. Y. 268), or on his own belief as to the law. Here the intent to defy the dignity and authority of the court on invalid grounds is clear (see, e.g., *Matter of Berkon v. Mahoney*, 268 App. Div. 825, affd. 294 N. Y. 828; *People v. Berson*, *supra*). The papers and records shall be sealed and deemed private and confidential, and no one shall have access to them without further order of this court or of the additional Special Term. Present—Wenzel, Acting P. J., Beldock, Murphy, Ughetta and Kleinfeld, JJ.

**Court of Appeals Decision in the Companion Case  
Reported in 4 N. Y. 2d 676**

Anonymous (M.), *Matter of, v. Arkwright* (2d Dept.; 5 A. D. 2d 790) denied.

## APPENDIX B

**Copies of the Determinations and Mandates of the additional Special Term and the final Order of the Appellate Division and of the Court of Appeals.**

### Contempt Order—Howard Bluestein

At an Additional Special Term of the Supreme Court held in and for the County of Kings at the Borough Hall in Brooklyn, Kings County, New York, on the 24 day of April, 1958, pursuant to a certain order of the Appellate Division made and entered on the 21st day of January, 1957.

Present:

HONORABLE GEORGE A. ARKWRIGHT

*Justice*

---

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings.

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The Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on January 21, 1957, having made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of



*Contempt Order—Howard Bluestein*

the Brooklyn Bar Association dated December 11, 1956; and pursuant to said order, as amended, said Appellate Division having directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and pursuant to said order, as amended, the said Appellate Division having appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and pursuant to said order, as amended, said Appellate Division having assigned the said Justice to hold said Additional Special Term; and pursuant to said order, as amended, said Appellate Division having designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And the said Court and said Justice having on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day, pending before it and him the said Judicial Inquiry and Investigation, one Howard Bluestein was then and there in open court duly called as a witness by Denis M. Hurley, Esq., pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Howard Bluestein; and the said Howard Bluestein, after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:

1. "In the Gotham Claims Bureau is your partner Neal Perducani?"

*Contempt Order—Howard Bluestein*

2. "Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the County Clerk's office?"

3. Are you and Mr. Percudani the only partners in that firm?"

4. "Is your place of business at 16 Court Street, Brooklyn?"

5. "How many employees do you have in your business?"

6. "Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?"

7. "Does your firm Gotham Claims Bureau do work for attorneys?"

8. "Does your company do work for an attorney named I. Frank Miller?"

9. "Has your firm done work for an attorney named David Goldner?"

10. "Have you or your firm done work for Mr. Zangara?"

11. "Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?"

12. "Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?"

13. "Have you referred any cases to a lawyer named I. Frank Miller?"

14. "Have you referred any cases to a lawyer named David Goldner?"

*Contempt Order—Howard Bluestein*

15. "Will you name the attorneys to whom you have referred cases, negligence cases?"

16. "Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?"

and thereupon the said Howard Bluestein did in the immediate view and presence of said Court and Justice, contumaciously, unlawfully and without reasonable or just cause refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by the said Appellate Division and the due and orderly administration of justice;

And the said Court and Justice having ordered that said Howard Bluestein reappear before said Court and Justice on April 24, 1958;

And the said Howard Bluestein, having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Howard Bluestein having been again asked, in verbatim, the above listed legal and proper interrogatories and having then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And the said Howard Bluestein did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

*Commitment—Howard Bluestein*

WHEREUPON AND WHEREFORE, it is hereby ordered and adjudged that the said Howard Bluestein still duly sworn as a witness and now present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories, as aforesaid, is guilty of a criminal contempt (Sections 750 (5), 751, Judiciary Law), by reason of the aforesaid contumacious, unlawful and unreasonable conduct and it is further hereby ordered and adjudged that said Howard Bluestein be imprisoned and held in close custody in jail in the County of Kings, for thirty (30) days; and it is further hereby ordered and adjudged that this order be sealed and impounded and the County Clerk is hereby directed to prohibit access to this order without further order of this Court.

Let a commitment issue accordingly.

Enter

GEORGE A. ARKWRIGHT  
Justice, Supreme Court of the  
State of New York

*Commitment—Howard Bluestein*

THE PEOPLE OF THE STATE OF NEW YORK

To the Sheriff of the City of New York, Kings County  
Division, GREETING:

WHEREAS the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, on January 21, 1957, made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of

*Commitment—Howard Bluestein*

the Brooklyn Bar Association dated December 11, 1956, and whereas, pursuant to said order, as amended, the said Appellate Division directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and whereas pursuant to said order, as amended, the said Appellate Division appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and whereas, pursuant to said order, as amended, said Appellate Division assigned the said Justice to hold said Additional Special Term; and whereas, pursuant to said order, as amended, said Appellate Division designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And whereas said Court and said Justice on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day had pending before it and him the said Judicial Inquiry and Investigation; and whereas one Howard Bluestein was then and there in open court duly called as a witness by Denis M. Hurley, Esq., counsel in said Judicial Inquiry and Investigation, pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Howard Bluestein; and whereas the said Howard Bluestein after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein, was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:



*Commitment—Howard Bluestein*

1. "In the Gotham Claims Bureau is your partner Neal Perducani?"

2. "Is the Gotham Claims Bureau a trade name, a certificate as to which has been filed in the County Clerk's office?"

3. "Are you and Mr. Percudani the only partners in that firm?"

4. "Is your place of business at 16 Court Street, Brooklyn?"

5. "How many employees do you have in your business?"

6. "Will you please name the employees you have in your concern, Gotham Claims Bureau, 16 Court Street?"

7. "Does your firm Gotham Claims Bureau do work for attorneys?"

8. "Does your company do work for an attorney named I. Frank Miller?"

9. "Has your firm done work for an attorney named David Goldner?"

10. "Have you or your firm done work for Mr. Zangara?"

11. "Have you personally referred any cases, Mr. Bluestein, to Mr. Zangara?"

12. "Do you know, Mr. Bluestein, whether Mr. Zangara has named you in any statements of retainer he filed in the Appellate Division in negligence cases?"

13. "Have you referred any cases to a lawyer named I. Frank Miller?"

*Commitment—Howard Bluestein*

14. "Have you referred any cases to a lawyer named David Goldner?"

15. "Will you name the attorneys to whom you have referred cases, negligence cases?"

16. "Have you ever had occasion to hire the services, engage the services of a lawyer in a negligence case?"

and whereas therefore the said Howard Bluestein did in the immediate view and presence of said Court and Justice contumaciously, unlawfully and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and whereas said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation, ordered as aforesaid by the said Appellate Division, and the due and orderly administration of justice;

And whereas the said Court and Justice having ordered that said Howard Bluestein reappear before said Court and Justice on April 24, 1958;

And whereas the said Howard Bluestein, having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Howard Bluestein having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And whereas the said Howard Bluestein did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution

*Commitment—Howard Bluestein*

and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

And whereas it was thereupon and therefore ordered and adjudged on April 24, 1958, by said Court and Justice that the said Howard Bluestein then present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories was and is guilty of a criminal contempt (Sections 750(5), 751, Judiciary Law) by reason of the aforesaid contumacious, unlawful and unreasonable conduct in said Judicial Inquiry and Investigation; and whereas it was then further ordered and adjudged by said Court and Justice on April 24, 1958, that the said Howard Bluestein be imprisoned and held in close custody in jail in the County of Kings, for thirty (30) days;

Now, THEREFORE, we command you that you take the body of the said Howard Bluestein and safely keep him in your close custody in jail in the County of Kings for thirty (30) days; and you are to return this writ and to make and return to said Supreme Court in Kings County a certificate under your hand of the manner in which you have executed the same; and we further command you that you seal and impound this writ and you are to prohibit access to this writ without further command from this Court.

WITNESS, Honorable George A. Arkwright, one of the Justices of the Supreme Court, at the Borough Hall in the Borough of Brooklyn, County of Kings, City and State of New York, this 24 day of April, 1958.

By the Court

JOSEPH B. WHITTY  
Clerk

GEORGE A. ARKWRIGHT  
J. S. C.

## Order Confirming Determination

At a Term of the Appellate Division of the  
Supreme Court of the State of New York  
held in and for the Second Judicial Depart-  
ment at the Borough of Brooklyn, on the  
26th day of May, 1958.

Present:

HON. GERALD NOLAN, *Presiding Justice*,

“ HENRY G. WENZEL, JR.,

“ GEORGE J. BELDOCK,

“ HENRY L. UGHETTA,

“ JAMES T. HALLINAN,

*Justices.*

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In the Matter of the Application of

ANONYMOUS No. 6,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice  
Act, to review and annul the determination and mandate  
of the HONORABLE GEORGE A. ARKWRIGHT, as Justice of  
the Supreme Court,

Respondent.

---

¶ The above named Anonymous No. 6, the petitioner in  
this proceeding having made an application, pursuant to  
Article 78 of the Civil Practice Act, to the Appellate Divi-  
sion of the Supreme Court in the Second Judicial Depart-  
ment, by petition sworn to the 25th day of April, 1958, to  
review and annul the determination and order of the Addi-  
tional Special Term of the Supreme Court, Kings County,  
made and entered in the office of the Clerk of the County  
of Kings on April 24th, 1958, adjudging petitioner guilty

*Order Confirming Determination*

of criminal contempt and ordering his imprisonment in jail in the County of Kings for thirty days, and the said proceeding having come on for hearing before this court, by an order to show cause dated April 26th, 1958.

Now on reading and filing the order 'to show cause, dated April 26th, 1958, the petition sworn to April 25th, 1958, petitioner's brief, the answer and return of respondent, the minutes of April 22, 1958, the order of April 24th, 1958, and all the papers filed herein, and Mr. Raphael H. Weissman appearing for petitioner, and Mr. Denis M. Hurley appearing for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

IT IS ORDERED AND ADJUDGED that the determination of respondent be and the same hereby is unanimously confirmed, without costs.

Enter:

JOHN J. CALLAHAN  
Clerk



# Order Dismissing Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of June A. D. 1958.

Present:

HON. ALBERT CONWAY,  
*Chief Judge, presiding.*

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In the Matter of the Application of

ANONYMOUS No. 6,

Appellant,

for an Order pursuant to Article 78 C. P. A. to review and annul the determination and mandate of the HONORABLE GEORGE A. ARKWRIGHT, as Justice of the Supreme Court,  
Respondent.

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A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and appeal dismissed upon the ground that no substantial constitutional question is involved.

A copy

GEARON KIMBALL  
Deputy Clerk

## **Contempt Order—Neal Percudani**

At an Additional Special Term of the Supreme Court held in and for the County of Kings at the Borough Hall in Brooklyn, Kings County, New York, on the 24th day of April, 1958, pursuant to a certain order of the Appellate Division made and entered on the 21st day of January, 1957.

**Present:**

**Honorable GEORGE A. ARKWRIGHT**

*Justice*

---

In the Matter of the Petition of the Brooklyn Bar Association for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-Law, and by Others Acting in Concert with Them, in the County of Kings.

---

The Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on January 21, 1957, having made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and pursuant to said order, as amended, said Appellate Division having directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and pursuant to said order, as amended, the said Appellate Division having appointed an

*Contempt Order—Neal Percudani*

Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and pursuant to said order, as amended, said Appellate Division having assigned the said Justice to hold said Additional Special Term; and pursuant to said order, as amended, said Appellate Division having designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And the said Court and said Justice having on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day, pending before it and him the said Judicial Inquiry and Investigation, one Neal Percudani was then and there in open court duly called as a witness by Denis M. Hurley, Esq., pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Neal Percudani; and the said Neal Percudani, after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:

1. "Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau located in Brooklyn, New York?"

2. "Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—"

3. "In connection with Gotham Claims Bureau, Mr. Percudani, would you tell this Court what attorneys you do investigating work for?"

*Contempt Order—Neal Percudani*

4. "How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you or Mr. Bluestein?"

5. "Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?"

6. "Mr. Percudani, did you work in connection with your business, the Gotham Claims Bureau, for an attorney named I. Frank Miller at any time?"

7. "Mr. Percudani, did you in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?"

8. "Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?"

9. "Mr. Percudani, how old are you, sir?"

10. "Where do you live now, Mr. Percudani?"

11. "Mr. Percudani, were you born in 1903?"

12. "Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?"

13. "Are you married, Mr. Percudani?"

14. "Let me ask you this: Is the Gotham Claims Agency a trade name?"

15. "And are you and Mr. Bluestein the only partners in that concern?"

16. "Are your offices at 16 Court Street, Brooklyn, New York, sir?"

17. "Is the principal work of Gotham Claims Bureau investigating cases for attorneys?"

*Contempt Order—Neal Percudani*

18. "Have you personally, Mr. Percudani, referred any cases to attorneys?"

19. "Have you done any investigating work for an attorney named David Goldner?"

20. "Have you referred a number of cases to Mr. Goldner?"

21. "Have you produced today, Mr. Percudani, your financial records?"

22. "Have you produced your records, reports, statements, bills pertaining to any and all investigations or business of any nature for or concerning I. Frank Miller, attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?"

23. "Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?"

24. "Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?"

and thereupon the said Neal Percudani did in the immediate view and presence of said Court and Justice, contumaciously, unlawfully and without reasonable or just cause refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by the said Appellate Division and the due and orderly administration of justice;

And the said Court and Justice having ordered that said Neal Percudani reappear before said Court and Justice on April 24, 1958;



*Contempt Order—Neal Percudani*

And the said Neal Percudani having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Neal Percudani having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And the said Neal Percudani did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

WHEREUPON AND WHEREFORE, it is hereby ordered and adjudged that the said Neal Percudani still duly sworn as a witness and now present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories, as aforesaid, is guilty of a criminal contempt (Sections 750 (5), 751, Judiciary Law), by reason of the aforesaid contumacious, unlawful and unreasonable conduct and it is further hereby ordered and adjudged that said Neal Percudani be imprisoned and held in close custody in jail in the County of Kings for thirty (30) days; and it is further hereby ordered and adjudged that this order be sealed and impounded and the County Clerk is hereby directed to prohibit access to this order without further order of this Court.

Let a commitment issue, accordingly.

Enter

GEORGE A. ARKWRIGHT,  
*Justice, Supreme Court of the  
State of New York.*

## Commitment—Neal Percudani

THE PEOPLE OF THE STATE OF NEW YORK

*To the Sheriff of the City of New York, Kings County  
Division, GREETING:*

WHEREAS the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, on January 21, 1957, made and entered an order, as amended by an order of said Appellate Division dated February 11, 1957, directing that a Judicial Inquiry and Investigation be made as prayed for in the petition of the Brooklyn Bar Association dated December 11, 1956; and whereas, pursuant to said order, as amended, the said Appellate Division directed that said Judicial Inquiry and Investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and whereas pursuant to said order, as amended, the said Appellate Division appointed an Additional Special Term of the Supreme Court in and for the County of Kings to be held commencing January 22, 1957, at the Court House in Brooklyn, Kings County, New York, or at such other places as the Justice assigned to said Additional Special Term might deem advisable; and whereas, pursuant to said order, as amended, said Appellate Division assigned the said Justice to hold said Additional Special Term; and whereas, pursuant to said order, as amended, said Appellate Division designated Denis M. Hurley, Esq., an attorney and counselor-at-law of 32 Court Street, Brooklyn, New York, to aid said Justice in the conduct of said Judicial Inquiry and Investigation;

And whereas said Court and said Justice on the 22nd day of April, 1958, at or about 10:00 o'clock in the forenoon of said day had pending before it and him the said Judicial Inquiry and Investigation; and whereas one Neal Percudani

*Commitment—Neal Percudani*

was then and there in open court duly called as a witness by Denis M. Hurley, Esq., counsel in said Judicial Inquiry and Investigation, pursuant to subpoena theretofore duly issued by said Court and Justice and duly served upon said Neal Percudani; and whereas the said Neal Percudani after having been duly sworn as a witness in said Judicial Inquiry and Investigation, he being a material and necessary witness therein, was then and there duly ordered by said Court and Justice to answer the following legal and proper interrogatories:

1. "Mr. Percudani, are you connected in some way or any way with Gotham Claims Bureau located in Brooklyn, New York?"

2. "Mr. Percudani, prior to the time you set up or organized this Gotham Claims Bureau, did you work for one of the insurance companies in New York City, specifically—"

3. "In connection with Gotham Claims Bureau, Mr. Percudani, would you tell this Court what attorneys you do investigating work for?"

4. "How long have you been in business as the Gotham Claims Bureau, Mr. Percudani, you or Mr. Bluestein?"

5. "Prior to forming the Gotham Claims Bureau, were you in the employ of the Consolidated Mutual Insurance Company as an investigator?"

6. "Mr. Percudani, did you work in connection with your business, the Gotham Claims Bureau, for an attorney named I. Frank Miller at any time?"

7. "Mr. Percudani, did you in connection with your business, the Gotham Claims Bureau, do work at any time for an attorney named Jerome Edelman, E-d-e-l-m-a-n?"

*Commitment—Neal Percudani*

8. "Is your work in the Gotham Claims Bureau basically or primarily concerned with investigations for attorneys, Mr. Percudani?"

9. "Mr. Percudani, how old are you, sir?"

10. "Where do you live now, Mr. Percudani?"

11. "Mr. Percudani, were you born in 1903?"

12. "Do you now reside at 1489 Lake Shore Drive, Massapequa, Long Island?"

13. "Are you married, Mr. Percudani?"

14. "Let me ask you this: Is the Gotham Claims Agency a trade name?"

15. "And are you and Mr. Bluestein the only partners in that concern?"

16. "Are your offices at 16 Court Street, Brooklyn, New York, sir?"

17. "Is the principal work of Gotham Claims Bureau investigating cases for attorneys?"

18. "Have you personally, Mr. Percudani, referred any cases to attorneys?"

19. "Have you done any investigating work for an attorney named David Goldner?"

20. "Have you referred a number of cases to Mr. Goldner?"

21. "Have you produced today, Mr. Percudani, your financial records?"

22. "Have you produced your records, reports, statements, bills pertaining to any and all investigations or business of any nature for or concerning I. Frank Miller, attorney, 50 Court Street, Brooklyn, and any other attorney or attorneys that engaged your concern for investigations or adjustments of

*Commitment—Neal Percudani*

claims, all as outlined in the subpoenas duces tecum that were served upon you? Have you produced those records?"

23. "Mr. Zangara, who was in the courtroom before, he is your attorney, is he, sir?"

24. "Who is the attorney who represented you and your firm, Gotham Claims Bureau, in the courtroom this morning?"

and whereas therefore the said Neal Percudani did in the immediate view and presence of said Court and Justice contumaciously, unlawfully and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories: and whereas said refusal tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation, ordered as aforesaid by the said Appellate Division, and the due and orderly administration of justice;

And whereas the said Court and Justice having ordered that said Neal Percudani reappear before said Court and Justice on April 24, 1958;

And whereas the said Neal Percudani, having reappeared before said Court and Justice on the 24th day of April, 1958, and still being duly sworn as a witness as aforesaid, the said Neal Percudani having been again asked, in verbatim, the above listed legal and proper interrogatories and having been then and there again duly ordered by said Court and Justice to answer the said interrogatories;

And whereas the said Neal Percudani did again in the immediate view and presence of said Court and Justice, contumaciously, unlawfully, and without reasonable or just cause, refuse and continue to refuse to answer the above listed legal and proper interrogatories; and said refusal



*Commitment—Neal Percudani*

tended and still tends to impair, impede, prejudice, obstruct, hinder and delay the due and effectual prosecution and orderly conduct of said Judicial Inquiry and Investigation ordered as aforesaid by said Appellate Division, and the due and orderly administration of justice;

And whereas it was thereupon and therefore ordered and adjudged on April 24, 1958 by said Court and Justice that the said Neal Percudani then present before said Court and Justice and still refusing to answer the above listed legal and proper interrogatories was and is guilty of a criminal contempt (Sections 750(5), 751, Judiciary Law) by reason of the aforesaid contumacious, unlawful and unreasonable conduct in said Judicial Inquiry and Investigation; and whereas it was then further ordered and adjudged on April 24, 1958 by said Court and Justice that the said Neal Percudani be imprisoned and held in close custody in jail in the County of Kings, for thirty (30) days;

Now, THEREFORE, we command you that you take the body of the said Neal Percudani and safely keep him in your close custody in jail in the County of Kings for thirty (30) days; and you are to return this writ and make and return to said Supreme Court in Kings County a certificate under your hand of the manner in which you have executed the same; and we further command you that you seal and impound this writ and you are to prohibit access to this writ without further command from this Court;

WITNESS HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of the Supreme Court, at the Borough Hall in the Borough of Brooklyn, County of Kings, City and State of New York, this 24th day of April, 1958.

By the Court

JOSEPH B. WHITTY,  
Clerk.

GEORGE A. ARKWRIGHT,  
J. S. C.

## Order Confirming Determination

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 26th day of May, 1958.

Present:

HON. GERALD NOLAN, *Presiding Justice*,

" HENRY G. WENZEL, JR.,

" GEORGE J. BELDOCK,

" HENRY L. UGHETTA,

" JAMES T. HALLINAN,

*Justices.*

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In the Matter of the Application of  
ANONYMOUS No. 7,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act, to review and annul the determination and mandate of the HONORABLE GEORGE A. ARKWRIGHT, as Justice of the Supreme Court.

Respondent.

---

The above named Anonymous No. 7, the petitioner in this proceeding having made an application, pursuant to Article 78 of the Civil Practice Act, to the Appellate Division of the Supreme Court in the Second Judicial Department, by petition sworn to the 25th day of April, 1958, to review and annul the determination and order of the Additional Special Term of the Supreme Court, Kings County, made and entered in the office of the Clerk of the County of Kings on April 24th, 1958, adjudging

*Order Confirming Determination*

petitioner guilty of criminal contempt and ordering his imprisonment in jail in the County of Kings for thirty days, and the said proceeding having come on for hearing before this court, by an order to show cause, dated April 26th, 1958.

Now on reading and filing the order to show cause, dated April 26th, 1958, the petition sworn to April 25th, 1958, petitioner's brief, the answer and return of respondent, the minutes of April 22, 1958, the order of April 24th, 1958, and all the papers filed herein, and Mr. Raphael H. Weissman appearing for petitioner, and Mr. Denis M. Hurley appearing for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

IT IS ORDERED AND ADJUDGED that the determination of respondent be and the same hereby is unanimously confirmed, without costs.

Enter,

JOHN J. CALLAHAN,  
Clerk.

# **Order Dismissing Appeal**

## **STATE OF NEW YORK**

### **IN COURT OF APPEALS**

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of June, A. D. 1958.

Present:

**HON. ALBERT CONWAY, Chief Judge, presiding**

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In the Matter of the Application of

**ANONYMOUS No. 7,**

**Appellant,**

for an Order pursuant to Article 78 C. P. A. to review and annul the determination and mandate of the **HONORABLE GEORGE A. ARKWRIGHT**, as Justice of the Supreme Court,

**Respondent.**

---

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

**ORDERED**, that the said motion be and the same hereby is granted and appeal dismissed upon the ground that no substantial constitutional question is involved.

A copy,

**GEARON KIMBALL,**  
Deputy Clerk.

**LIBRARY**  
**SUPREME COURT. U. S.**

Office-Supreme Court, U.S.

**FILED**

**OCT 15 1958**

**JAMES R. BROWNING, Clerk**

**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM —1958**

**No. 378**

**ANONYMOUS NOS. 6 AND 7,**

**Appellants,**

**—against—**

**HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York,**

**Appellee.**

**ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK.**

**MOTION TO DISMISS**

**DENIS M. HURLEY,**  
**Attorney and Counsel for Appellee,**  
**Office and Post Office Address,**  
**Room 301, Borough Hall,**  
**Brooklyn 1, New York.**

**MICHAEL CAPUTO,**  
**On the Brief.**



# INDEX.

SUBJECT MATTER	PAGE
Statement .....	1
Argument .....	3
Conclusion .....	10
Appendix (Order dated January 21, 1957) .....	11

## CASES CITED.

Anonymous No. 6 v. Arkwright, 6 A. D. 2d 719, 4 N. Y. 2d 1034 .....	3
Anonymous No. 7 v. Arkwright, 6 A. D. 2d 719, 4 N. Y. 2d 1034 .....	3
Georgia v. La Gay, 357 U. S. 504, 510 .....	8, 9
Crooker v. California, 357 U. S. 433 .....	8, 9
Matter of Groban, 352 U. S. 330, 339 .....	7, 8, 9, 10
M. Anonymous v. Arkwright, 5 A. D. 2d 790 .....	4, 5
People ex rel. Karlin v. Culkin, 248 N. Y. 465, 479 .....	6
S. Anonymous v. Arkwright, 5 A. D. 2d 792 .....	4, 5
Wilson v. Cook, 327 U. S. 474, 480, 482 .....	4

## STATUTES, ETC.

Revised Rules of the Supreme Court of the United States, Rule 16 .....	1
N. Y. State Constitution, Article VI, Sec. 2 .....	2
N. Y. State Judiciary Law, Secs. 86, 90, 90 (10) .....	2, 4
N. Y. State Judiciary Law, Sec. 750 (5) .....	3
N. Y. State Judiciary Law, Sec. 751 .....	3
N. Y. State Judiciary Law, Sec. 752 .....	3
N. Y. State Civil Practice Act, Article 78, Sec. 1287 .....	3
28 U. S. C., Sec. 1257 (2) .....	3
28 U. S. C., Sec. 2103 .....	3
N. Y. State Code of Criminal Procedure, Secs. 188, 189, 190 .....	9

IN THE  
**Supreme Court of the United States**

OCTOBER TERM — 1958

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No. 378

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ANONYMOUS NOS. 6 AND 7,

Appellants,

—against—

HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York,

Appellee.

---

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK.

---

**MOTION TO DISMISS**

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that the question sought to be reviewed was never raised in the New York State Courts and that the question that was raised is not a substantial Federal question.

**STATEMENT**

This is an appeal from two orders of the Court of Appeals of the State of New York, dated and entered on June 25, 1958, dismissing appellants' appeals from orders of the Appellate Division of the Supreme Court of the State of New

York, Second Judicial Department, dated and entered on May 26, 1958.

The Court of Appeals dismissed appellants' appeals on the ground that no substantial constitutional question was involved.

By order dated January 21, 1957, the Appellate Division directed a judicial inquiry and investigation into alleged unethical practices of attorneys and others acting in concert with them. (A copy of the January 21, 1957 order is appended.) The inquiry is commonly called an "ambulance chasing investigation." Investigations of this type have been conducted, periodically, in various counties within the City of New York. An investigation in the county now involved last took place some 30 years ago. Appellants are not lawyers; they are New York State licensed private detectives and investigators. They were called to testify in the investigation because the investigative staff had information which indicated that appellants were acting in concert with certain attorneys whose conduct was being investigated.

The judicial inquiry and investigation (Judicial Inquiry) was ordered pursuant to Article VI, Section 2 of the New York State Constitution, and Sections 86 and 90 of the New York State Judiciary Law (McKinney's Consolidated Laws of New York, Book 29). For the purpose of conducting the Judicial Inquiry, there was created an Additional Special Term of the Supreme Court of the State of New York, Kings County, and appellee, a Justice of that Court, was designated to preside. The investigation, pursuant to the January 21, 1957 order has been and is now being conducted in private as provided for in Section 90 (10) of the New York State Judiciary Law.

Appellants were called to testify as witnesses in the investigation. Each appellant was examined separately before appellee at the Additional Special Term. During the examination, their attorney, at the direction of appellee, was absent from the hearing room. However, at appellants' request, on

several occasions, the examination was interrupted and appellee allowed appellants to leave the hearing room to seek advice from their attorney who throughout the examination was waiting outside. After receiving advice from their attorney, appellants re-entered the hearing room and the examination was continued in the absence of their attorney. During the examination, appellants refused to answer certain questions on the sole ground that they were being deprived of the right to be represented by counsel while being examined as witnesses. They maintained that this deprivation was violative of the due process clause of the Fourteenth Amendment to the United States Constitution. For their refusal to answer, appellee held them in criminal contempt of court (Section 750 (5) New York State Judiciary Law) and committed them to jail for thirty days (Section 751, New York State Judiciary Law). Appellants have served two days of that sentence. Then they had the contempt orders of the appellee reviewed by the Appellate Division (Section 752, Judiciary Law; Section 1287 of Article 78, New York State Civil Practice Act—Gilbert Bliss Civil Practice Act of New York). The Appellate Division confirmed the contempt orders (*Anonymous No. 6 v. Arkwright*, 6 App. Div. 2d 719; *Anonymous No. 7 v. Arkwright*, 6 App. Div. 2d 719). Upon appeal to the Court of Appeals, both appeals were dismissed on the ground that no substantial constitutional question was involved (*Anonymous No. 6 v. Arkwright*, 4 N. Y. 2d 1034; *Anonymous No. 7 v. Arkwright*, 4 N. Y. 2d 1034).

### ARGUMENT.

Appellants bring this appeal under 28 U. S. C., Section 1257 (2) or failing that they pray that their papers be treated as applications for writs of certiorari pursuant to 28 U. S. C. Section 2103 (Jurisdictional Statement, p. 4).

I. As claimed by appellants (Jurisdictional Statement, pp. 5 and 6), there is drawn in question the validity of a New

York State statute (Section 90 (10) Judiciary Law) on the ground of its being repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The appellants now, for the first time, contend that the denial of counsel while being examined as witnesses before appellee at the Additional Special Term is based on Section 90 (10) of the Judiciary Law; that such a denial is violative of the due process clause of the Fourteenth Amendment and that therefore the statute in question is unconstitutional. Appellants, however, contest the validity of that statute for the first time in this Court. The record shows that the question of validity under federal law of the statute was neither presented for decision to the New York State courts nor was it ever decided by them. Before appellee at the Additional Special Term, appellants contended that the denial of the presence of counsel in the hearing room was violative of the Fourteenth Amendment (pp. 49 and 57, transcript of testimony). The same argument was made in the Appellate Division (Bluestein petition, verified April 25, 1958, paragraphs 8 and 12; Percudani petition, verified April 25, 1958, paragraphs 8 and 12), and in the Court of Appeals (Bluestein affidavit, sworn to May 29, 1958, p. 2; Percudani affidavit, sworn to May 29, 1958, p. 2).

Appellants, however, at no time in any of the courts below questioned the validity of Section 90 (10) of the Judiciary Law. Moreover, in none of the New York State courts was the question of the constitutionality of that statute ever presented or passed upon.

Accordingly, appellants have no right to appeal to this Court from the orders of the New York State Court of Appeals. *Wilson v. Cook*, 327 U. S. 474, 480, 482.

The Appellate Division disposed of these two matters (6 App. Div. 2d 719) on the authority of *M. Anonymous v. Arkwright*, 5 App. Div. 2d 790, leave to appeal denied, 4 N. Y. 2d 676, and *S. Anonymous v. Arkwright*, 5 App. Div. 2d 792. Appellants contend that in *M. Anonymous* and *S. Anonymous*, the validity of Section 90 (10) of the Judiciary Law was drawn into question as violative of the due process clause of



the Fourteenth Amendment because it allows for the denial of counsel while a person is being examined as a witness before appellee at the Additional Special Term (Jurisdictional Statement, pp. 3 and 10). They seem to argue that since the question of the validity of Section 90 (10) of the Judiciary Law was raised in *M. Anonymous* and *S. Anonymous*, and since the two instant matters were decided by the Appellate Division on the authority of those two cases, then it must be considered that the same question was raised in the instant matters. This argument is without merit. To begin with, *M. Anonymous* and *S. Anonymous* were in no way involved with the constitutionality of the statute in question. Moreover, even if they were, it avails the appellants nothing. The question, if it is to be reviewable by this Court on appeal, must be raised in the New York State courts in the matter presently before the United States Supreme Court. This has not been done and therefore appellants have no right to appeal to this Court on the question as they have stated it.

II. Appellee concedes, however, that appellants did raise a constitutional question in the New York State courts. That question is: By denying appellants the presence of counsel while being examined as witnesses before appellee at the Additional Special Term, did appellee deprive appellants of a right protected by the due process clause of the Fourteenth Amendment?

Appellee contends that this is not a substantial Federal question.

The principal basis for appellants' contention that they are entitled to be represented by counsel while being examined as witnesses before appellee at the Additional Special Term, is that they are prospective defendants in criminal cases. Thus, they allege that they were "accused of crime" (Jurisdictional Statement, p. 8); that they were in "imminent peril of prosecution for crime" (Jurisdictional Statement, p. 9); that "evidence had already been gathered against them for a *prima facie* case of crime that was ready to be sent to the

District Attorney" (Jurisdictional Statement, pp. 11 and 14). All of these allegations derive from a statement made to appellants by a Judicial Inquiry attorney some four and one-half months before appellants testified. This statement was the personal opinion of the Judicial Inquiry attorney, furnished at appellants' request, and made in the presence of their attorney. (Jurisdictional Statement, pp. 8-9.)

The Judicial Inquiry, as noted, must be conducted in private. Appellee's duty is to preside at the Additional Special Term and at the conclusion of the inquiry report to the Appellate Division the proceedings, his findings and his recommendations. The investigation, which is quasi-administrative in nature, is non-adversary, and by reason of the secrecy injunction of the Appellate Division order of January 21, 1957, its closest analogue is a grand jury proceeding. It will neither end in any decree nor establish any right. See *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 479. The Judicial Inquiry can only seek facts and make recommendations based on those facts. No person called as a witness before the Additional Special Term can be charged with unlawful conduct since the appellee has no power to make such charges. See *People ex rel. Karlin v. Culkin*, *supra*, at 468-469. Regardless of what appellants were told by the Judicial Inquiry attorney (Jurisdictional Statement, pp. 8 and 9), they were not and could not be the subject of charges at or by the Additional Special Term. To place them, therefore, in the position of prospective defendants in criminal prosecutions is pure speculation. Appellants conclude that because of the statements made to them by the Judicial Inquiry attorney, they are now prospective defendants and therefore are entitled to the presence of counsel while being examined as witnesses before appellee at the Additional Special Term. As noted, appellants allege that they have been "accused of crime." Of course, this must be taken to mean that they may, at some future time, become defendants in criminal prosecutions; that is, that they are prospectively defendants. They use the phrase, "accused of crime", as a layman would use it. Legally, a person is not "accused of crime" until such time as

the appropriate procedures provided for in the constitutions and statutes in criminal cases have been invoked and properly applied. In the instant matters, this has not been done and therefore appellants, in a legal sense, have not been "accused of crime."

Whatever denomination may properly be used to describe appellants' capacity when they were before the Additional Special Term, it is clear that they were not entitled to counsel. Along these lines, it would be well to compare the immediacy of appellants' danger of becoming actual defendants with that of the appellants in *Matter of Groban*, 352 U. S. 330. In that case, the appellants were called as witnesses by a Fire Marshal of the State of Ohio in an examination being conducted by him into the causes of a fire.

The Fire Marshal was inquiring into the crime of arson and, according to the unchallenged affidavit of those appellants, he believed that they had started the fire. *Matter of Groban, supra*, at 339. He excluded counsel for appellants while he was examining them and this Court decided that such exclusion was not violative of the due process clause of the Fourteenth Amendment. Actually, the appellants here were in a much better position than the appellants in the *Groban* case. During the examination of appellants before appellee at the Additional Special Term, they could, and did, interrupt the examination and step outside the hearing room to confer with their attorney who was waiting there.

Appellants here were told by a Judicial Inquiry attorney that in his opinion, the evidence discovered against appellants was such as might warrant referral of it to the District Attorney. Certainly this does not make appellants prospective defendants in criminal prosecutions such as, under the due process clause, would entitle them to the benefit of counsel. To determine whether a prospective defendant in a criminal prosecution is entitled to the benefit of counsel, one must first determine the remoteness or immediacy of that person becoming an actual defendant in a criminal case. Thus, if a person's chances of becoming an actual defendant are remote,

it can hardly be said that he is now a prospective defendant entitled to the presence of counsel. That is precisely the situation here. Assuming appellants become, at some future time, actual defendants in criminal prosecutions based primarily on the evidence adduced before appellee at the Additional Special Term, how would that come about? The procedure used thus far in this investigation has been as follows: After evidence has been presented to the appellee, he makes his findings and recommendation based on that evidence. These findings and recommendations are then presented to the Appellate Division. Should the Appellate Division believe that the matters presented to it warrant consideration by the District Attorney, the Appellate Division passes a resolution giving the appellee and counsel for the Judicial Inquiry authority, if they deem it advisable, to present the matters to the District Attorney for his consideration. Should appellee and counsel for the Judicial Inquiry present the matters to the District Attorney, then the latter must decide whether they warrant presentation to a grand jury. If he does present them to a grand jury it finally happens that the person involved becomes a prospective defendant because, after all, the grand jury may fail to indict.

In these circumstances, while before the appellee, the possibility of appellants becoming actual defendants in criminal prosecutions is so remote that it is clear that the due process clause of the Fourteenth Amendment remains inviolate despite the fact that the appellants are not permitted the presence of counsel while being examined as witnesses at the Additional Special Term. Certainly appellants' danger is less imminent than that of the appellants in *Matter of Groban*, *supra*. Nor for that matter is the appellants' position any stronger than that of the petitioners in *Crooker v. California*, 357 U. S. 433 and *Cicenia v. LaGay*, 357 U. S. 504. In the two last cited cases, it was held that it is not violative of the due process clause of the Fourteenth Amendment for a state to deny counsel to murder defendants for a period of from 12 to 14 hours after being taken into



police custody during which time they voluntarily confessed to the murders. As was noted in the *Cicenia* case (357 U. S. at 510, fn. 4) the state involved (New Jersey) has no requirement that a man be represented by counsel between the time of arrest and arraignment. The same is true in New York State (Sections 188, 189, 190, Code of Criminal Procedure, McKinney's Consolidated Laws of New York, Book 66). In the *Groban*, *Crooker* and *Cicenia* cases the chances of the persons there becoming actual defendants in criminal prosecutions were real. By comparison, the instant appellants' chances of becoming actual defendants are more illusory than real.

In any event, there is no question but that the appellants here could have invoked the privilege against self-incrimination. This was, in fact, one of the underlying reasons for the decision in *Matter of Groban*, and it is a more impelling reason here. *Matter of Groban*, *supra*, 336-337 (Concurring Opinion of Mr. Justice Frankfurter). Appellants contend that because of what was told to them by the Judicial Inquiry attorney, as his personal opinion, they are prospective defendants entitled to the presence of counsel while being examined as witnesses before appellee at the Additional Special Term. But appellants were furnished with this private opinion, at their own request, four and one half months before they were called to testify as witnesses, and they were given the opinion in the presence of their attorney. Surely, in these circumstances, leaving appellants to invoke the privilege against self-incrimination is in accordance with due process. Appellants cannot validly contend that they need the presence of counsel, while being examined as witnesses, to advise them of their right to invoke the privilege against self-incrimination. They are persons licensed by the State of New York to practice as private detectives and investigators, and as such it must be assumed that they are possessed of a sufficient degree of intelligence to be able to understand the privilege. Moreover, appellants had ample time (four and a half months) within which to



discuss with their attorney the evidence possessed by the Judicial Inquiry before making their appearances as witnesses. Against such a background, appellants' plea that they need counsel to advise them as to the privilege against self-incrimination, must go unheeded especially since it comes "at a time when this privilege has attained the familiarity of the comic strips." *Matter of Groban, supra* at 337.

In view of the patent similarity between the instant appeal and *Matter of Groban*, the law on the question raised by appellants is settled, and therefore, the question is not one of such substantiality as to require a review by this Court.

### CONCLUSION

The question sought to be reviewed by appellants was never raised in the New York State courts; the question that was raised is not a substantial federal question and therefore the appeal should be dismissed, or in the alternative a writ of certiorari should be denied.

Dated: October 16, 1958

Brooklyn, N. Y.

Respectfully submitted,

DENIS M. HURLEY,  
Attorney and Counsel for Appellee.

MICHAEL CAPUTO,  
On the Brief.

**APPENDIX**

**At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.**

**Present: HON. GERALD NOLAN,**

*Presiding Justice,*

**" HENRY G. WENZEL, JR.,**

**" GEORGE J. BELDOCK,**

**" CHARLES E. MURPHY,**

**" HENRY L. UGHETTA,**

*Associate Justices.*

---

**IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS.**

---

A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

**NOW, THEREFORE**, pursuant, to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

**ORDERED**, that a judicial inquiry and investigation be and they hereby are directed to be made:

(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

**ORDERED**, that such inquiry and investigation shall be conducted by the HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

**ORDERED**, that, for the purpose of conducting said inquiry and investigation, AN ADDITIONAL SPECIAL TERM OF THE SUPREME COURT, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice GEORGE A. ARKWRIGHT, be and he hereby is assigned to hold such Special Term; and it is further

ORDERED, that DENIS M. HURLEY, ESQ., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7); and it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

Enter,

GERALD NOLAN,  
Presiding Justice.

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**FILED**

**OCT 31 1958**

**JAMES R. BROWNING, Clerk**

IN THE

**Supreme Court of the United States**

**October Term, 1958**

**No. 378**

**ANONYMOUS NOS. 6 AND 7,**

*Appellant,*

*against*

**HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York,**

*Appellee.*

**ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK.**

**BRIEF OPPOSING MOTION TO DISMISS**

**RAPHAEL H. WEISSMAN,**  
*Attorney and Counsel for Appellants,*  
**Office & P. O. Address,**  
**185 Montague Street,**  
**Brooklyn 1, New York.**



# INDEX

	PAGE
Questions Presented .....	1
Argument .....	2
Conclusion .....	5

## Table of Cases

Cicenia v. La Gay, 357 U. S. 504 .....	4, 5
Crooker v. California, 357 U. S. 433 .....	4, 5
Matter of Groban, 352 U. S. 330 .....	2, 3, 5
Matthews v. Huwe, 269 U. S. 262 .....	3
Tumey v. Ohio, 273 U. S. 510 .....	3
Wilson v. Cook, 327 U. S. 474 .....	3, 4

## Other Authorities

Judiciary Law of the State of New York:	
Section 90, Subdivision 10 .....	1, 2, 3
28 U. S. C., Section 2103 .....	2, 4, 5
United States Constitution:	
Fourteenth Amendment .....	1, 2

IN THE  
**Supreme Court of the United States**

**October Term, 1958**

**No. 378**

---

**ANONYMOUS NOS. 6 AND 7,**

*Appellants,*

*against*

**HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York,**

*Appellee.*

---

**ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK.**

---

**BRIEF OPPOSING MOTION TO DISMISS**

---

**Questions Presented**

Whether section 90, subdivision 10, of the Judiciary Law of the State of New York, in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as construed and applied in these cases, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellants who are not attorneys at law and who had been told before their questioning by a member of the Inquiry staff that evidence of a prima facie case of crime had already been gathered and was

ready to be sent to the District Attorney for prosecution and who nevertheless were denied the presence of their counsel in the courtroom during the questioning as a result of which the appellants refused to answer certain questions?

Whether the judgments on appeal in the circumstances stated in the previous questions denied to appellants such due process?

### Argument

The case is ripe for the exercise of this court's jurisdiction to review it on the merits. The motion to dismiss concedes (p. 5) that appellants "did raise a constitutional question in the New York Courts", namely, whether the denial of counsel in the circumstances of this case did "deprive appellants of a right protected by the due process clause of the Fourteenth Amendment?" The jurisdictional statement shows that the questions presented are substantial and important. The case should be decided on this appeal. Absent remedy in the form of appeal, certiorari should be granted on the instant papers under 28 U. S. C., Section 2103.

#### I. Appeal lies here.

In *Matter of Groban*, 352 U. S. 330, this Court wrote (pp. 331-332):

"The Ohio Supreme Court construed Section 3737.13 to authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal."

The instant case is substantially similar. Here, too, appellants attack the constitutionality of the applicable part of subdivision 10, section 90, Judiciary Law of the State of New York. Here, too, the New York courts construed that statute to authorize the exclusion of counsel. As the jurisdictional statement shows (p. 3), the instant

case was decided upon the authority of the companion case. In the companion case (5 A. D. 2d 790, leave to appeal denied, 4 N. Y. 2d 676) the Appellate Division wrote (5 A. D. 790):

"The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); \* \* \*'. It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald v. Keelex*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

The dismissals by the New York Court of Appeals "upon the ground that no substantial constitutional question is involved" (4 N. Y. 2d 1034) were in effect affirmances of the Appellate Division on the merits, *Tumey v. Ohio*, 273 U. S. 510; *Matthews v. Huwe*, 269 U. S. 262.

The only distinction between the quotation from *Groban* and the instant case is that here the New York Court of Appeals did not itself write the decision which construed the statute as authorizing the exclusion of counsel, but in effect affirmed that construction by the Appellate Division. That, it is submitted, is a distinction without a difference. Substantially the situations are the same.

"The purpose" of the highest-state-court-requirement on an appeal to this court based upon repugnancy of a state statute to federal law is that the highest state court should be "apprised" in order that the highest state court should have an "opportunity authoritatively to construe" the state statute, *Wilson v. Cook*, 327 U. S. 474, 480. That purpose was fully served here. The New York Court of Appeals was apprised by the Appellate Division decision that part of subdivision 10, section 90, of the Judiciary Law, has been construed and applied so as to deny counsel in the

teeth of a claim of federal due process. It had an opportunity authoritatively to construe the statute. Indeed, it did so by in effect affirming the decision of the Appellate Division.

The motion to dismiss states that appellants did not attack the constitutionality of the statute in the New York courts and cites *Wilson*. In *Wilson* it was held (p. 480) that in order to support an appeal to this court it must appear that the validity under federal law of the state statute, as construed and applied, "has either been presented for decision to the highest court of the state (citations), or has in fact been decided by it (citations)" (emphasis supplied).

Since, as already appears, the situation herein is the substantial equivalent of a construction by the New York Court of Appeals that the instant statute authorized the exclusion of counsel, it is of no significance that appellants did not attack the constitutionality of the statute in the New York courts. The appeal lies under the second of the alternatives quoted from *Wilson*.

II. Should this court find that for failure to attack the constitutionality of the statute in the New York courts remedy in the form of appeal is not available, then appellants invoke this court to grant certiorari on the instant papers under 28 U. S. C., Section 2103.

The jurisdictional statement shows that the questions presented are both substantial and important, that this court has recently reaffirmed the "high place", *Cicenia v. La Gay*, 357 U. S. 504, 509, in our scheme of procedural safeguards of the right to employ counsel in a criminal case and has granted certiorari "because of the serious due process implications that attend state denial of a request to employ an attorney," *Crooker v. California*, 357 U. S. 433, 434. There is no need to burden the court with a restatement of that showing here. The court is respect-



fully referred to the authorities, analysis and reasons for that showing made on pages 10-19 of the jurisdictional statement.

The motion to dismiss argues that the federal question presented is not "substantial" (p. 5) and cites *Groban*, *Crooker* and *Cicenia* on that head. The jurisdictional statement (pp. 10-19) also shows that investigation of the causes of a fire by a fire marshal (*Groban*) or preliminary police investigation (*Crooker* and *Cicenia*) cannot by reason or authority be equated with the instant Judicial Inquiry conducted by a Justice of the New York State Supreme Court in the calm atmosphere of a courtroom and with a large staff of counsel on one side. A courtroom is the one place in the world where a person accused should not be denied counsel.

### Conclusion

The case should be reviewed by this court on its merits either on this appeal or, in the alternative, by certiorari granted upon the instant papers under 28 U. S. C., Section 2103.

Respectfully submitted,

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JAMES R. [REDACTED] WING, Clerk

# Supreme Court of the United States

October Term, 1958

No. 378

ANONYMOUS NOS. 6 AND 7,  
*Appellants,*

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York.

APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

## BRIEF FOR APPELLANTS

RAPHAEL H. WEISSMAN,  
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Brooklyn 1, New York.

RICHARD C. WEISSMAN,  
*with him on the Brief.*

# INDEX

	PAGE
Opinions Below .....	2
Jurisdiction .....	2
The Constitutional Provision and Statute Involved ..	4
Questions Presented .....	5
Statement .....	6
Summary of Argument .....	10
POINT I—The case is ripe for decision on this appeal or by grant of certiorari if for technical reasons appeal does not lie .....	14
Appeal .....	14
Certiorari .....	17
POINT II—Exclusion of appellants' counsel from the courtroom during their questioning denied them Fourteenth Amendment due process .....	17
Conclusion .....	26

## Table of Cases Cited

Cicenia v. La Gay, 347 U. S. 504 .....	12, 23, 24
Crooker v. California, 357 U. S. 433 .....	12, 23, 24, 25
Matthews v. Huwe, 269 U. S. 262 .....	15
Matter of Anonymous (M.) v. Arkwright (5 A. D. 790, leave to appeal denied, 4 N. Y. 2d 676a) ..	3, 6, 15, 19
Matter of Groban, 352 U. S. 330 .....	11, 14, 17, 21
People of the State of New York v. Zimmerman, 278 U. S. 63 .....	16
People ex rel. Karlin v. Culkin, 248 N. Y. 465 .....	20
Sweezy v. State of New Hampshire by Wyman, 354 U. S. 234 .....	11, 17

	PAGE
<b>Tumey v. Ohio, 273 U. S. 510</b> .....	<b>15</b>
<b>Wilson v. Cook, 327 U. S. 474</b> .....	<b>11, 15</b>

### **Other Authorities Cited**

<b>Judiciary Law, Section 750, Subdivision 5</b> .....	<b>19</b>
<b>McKenney's Consolidated Laws of New York, An-</b> <b>notated, Book 29—Subdivision 10, Section 90</b> ....	<b>4</b>
<b>U. S. Constitution—Fourteenth Amendment</b> .....	<b>4</b>

# Supreme Court of the United States

October Term, 1958

No. 378

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ANONYMOUS NOS. 6 and 7,

*Appellants,*

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme  
Court of the State of New York.

---

APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

---

## BRIEF FOR APPELLANTS

Appellants Howard Bluestein (described above as Anonymous No. 6) and Neal Percudani (described above as Anonymous No. 7) appeal from the final orders of the Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court of Appeals on June 25, 1958, dismissing, upon the ground that no substantial constitutional question is involved, their appeals taken on constitutional grounds from final orders of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated and entered in the Appellate Division Clerk's office on May 26, 1958, which confirmed the determinations and mandates made at the Additional Special Term, Kings County (for a Judicial Inquiry by the Court into Certain Alleged Illegal, Corrupt and Unethical Practices and of Alleged Conduct Prejudicial to the Administration of Justice by Attorneys and Counselors-at-law, and by Others Acting in Concert



with Them, in the County of Kings), dated and entered in the office of the Clerk of Kings County, State of New York, on April 24, 1958, adjudging each appellant guilty of a criminal contempt of court and appellants submit this brief to show that the Supreme Court of the United States has jurisdiction and that their Fourteenth Amendment due process rights to representation by counsel have been violated.

### Opinions Below

The memoranda decisions of the Court of Appeals of the State of New York are reported in 4 N. Y. 2d 1034; 177 N. Y. S. 2d 687; 152 N. E. 2d 651. The Memoranda decisions of the Appellate Division of the Supreme Court of the State of New York, Second Department, are reported in 6 A. D. 2d 719 (2 and 3); 176 N. Y. S. 2d 227, 228.

### Jurisdiction

These were original petitions (R. 130, 140) in the Appellate Division to review the determinations and mandates made at the Additional Special Term (Judicial Inquiry), convicting each appellant of a criminal contempt of court for refusing, after being sworn and in the immediate view and presence of Mr. Justice Arkwright, the appellee, a justice of the Supreme Court, to answer questions put to him, in violation of Sections 750(5), 751, Judiciary Law of the State of New York (McKinney's Consolidated Laws of New York, Book 29). Each appellant was sentenced to thirty days imprisonment (R. 11, 41). Each served two days and is presently enlarged on bail in the sum of \$2500. "Such" determinations and mandates are "reviewable by a proceeding under article seventy-eight of the civil practice act", Section 752, Judiciary Law. Section 1287 of Article 78 of the Civil Practice Act (Gilbert-Bliss, Civil Practice Act of New York), provides that if the

petition be directed against a justice of the Supreme Court, the application shall be made to the Appellate Division in the first instance.

The petitions made the claim that appellants were denied Fourteenth Amendment, United States Constitution, due process of law, in that they were denied the presence of their counsel in the hearing room during the questioning (R. 132, 142).

Relying upon the companion case of *Matter of Anonymous (M.) v. Arkwright* (5 A. D. 790, leave to appeal denied, 4 N. Y. 2d 676), the Appellate Division confirmed the determinations and mandates of the appellee.

In the companion case, the right to exclude counsel from the hearing room during questioning was expressly based by the Appellate Division on its construction of Section 90, subdivision 10, of the Judiciary Law. The Judicial Inquiry was conducted by order of the Appellate Division. In the companion case, the Appellate Division wrote (5 A. D. 2d 790):

"The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); \* \* \*'. It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

Thereupon, appellants appealed as of right to the Court of Appeals of the State of New York, the highest state court. Their appeals were taken pursuant to the provisions of Section 588, subdivision 1, (a), Civil Practice Act, which allows an appeal as of right where a federal constitutional question is involved.

By the orders dated and entered in the office of the Clerk of the Court of Appeals on June 25, 1958, that court on appellee's motion dismissed the appeals, expressly, "upon the ground that no substantial constitutional question is involved" (R. 161, 162).

Each appellant filed a notice of appeal herein with the Clerk of the Court of Appeals on July 25, 1958 (R. 163, 166).

Each appellant also filed a notice of appeal herein with the Clerk of the Appellate Division, Second Department, on July 24, 1958, because the latter is possessed of part of the record required for review by this Court (R. 169, 172).

The jurisdiction of this Court to review these cases by direct appeal is invoked under 28 U. S. C., Section 1257(2).

Failing that, appellants invoke this Court to treat the papers as applications for writs of certiorari under 28 U. S. C., Section 2103.

Further consideration by this Court of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 174), 79 S. Ct. 151.

## **The Constitutional Provision and Statute Involved**

### **Fourteenth Amendment:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". The Constitution of the United States of America (Government Printing Office, 1924, p. 29)

Subdivision 10, Section 90, Judiciary Law of the State of New York, which may be found in McKinney's Con-

solidated Laws of New York, Annotated, Book 29, reads, as follows:

**"SEC. 90. Admission to and removal from practice by appellate division**

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

### **Questions Presented**

Whether Section 90, subdivision 10, of the Judiciary Law of the State of New York, in so far as it provides that "any inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and deemed private and confidential", as con-

strued and applied in these cases, is unconstitutional in that it denied Fourteenth Amendment, United States Constitution, due process of law to appellants who are not attorneys at law and who had been told before their questioning by a member of the Inquiry staff that evidence of a prima facie case of crime had already been gathered and was ready to be sent to the District Attorney for prosecution and who nevertheless were denied the presence of their counsel in the courtroom during the questioning as a result of which the appellants refused to answer certain questions?

Whether the judgment on appeal in the circumstances stated in the previous question denied to appellants such due process?

### **Statement**

The Judicial Inquiry was conducted by Mr. Justice Arkwright under an order made by the Appellate Division (R. 27). The scope of the inquiry and the main provisions of the order were thus summarized by the Appellate Division in the companion case (5 A. D. 2d 790-791):

"By an order of this court dated January 21, 1957, as amended by subsequent order dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices 'involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them' and with 'respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them.' The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and provided that the inquiry and investigation shall be



conducted by a named Justice of the Supreme Court, 'with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records'. An attorney nominated by the Brooklyn Bar Association was designated to aid said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court' and 'that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.'"

What is done with the evidence adduced at the Judicial Inquiry was thus described in Mr. Justice Arkwright's report to the Appellate Division on June 11, 1958 (R. 153):

"Your Court has also permitted Mr. Hurley and me to refer the evidence adduced at the Additional Special Term regarding 10 attorneys to the District Attorney of Kings County for possible criminal prosecution as well as for mandatory disciplinary proceedings. The District Attorney has initiated disciplinary proceedings against two (2) of these attorneys. In addition, a Kings County Grand Jury has returned an indictment for grand larceny against another attorney. Furthermore, your Honorable Court has authorized Mr. Hurley and myself to refer the facts which have been elicited at the Additional Special Term concerning the activities of certain doctors to the State Board of Regents for proper action."

Appellants were subpoenaed to appear and testify at the Judicial Inquiry (R. 60-61). Failure to appear or testify is punishable as a contempt of court.

Appellants are not attorneys-at-law (R. 65, 79). They are licensed private detectives and investigators (R. 138, 148). They do business as partners under the trade name of Gotham Claims Bureau (R. 61).

Appellants repeatedly protested to Mr. Justice Arkwright that they were being questioned as persons themselves accused of crime, not as mere witnesses, and that the accusation had been made by a member of the staff of the Judicial Inquiry. (R. 72, 73, 79, 85, 87).

Mr. Justice Arkwright held a hearing on this. Here is the text of the admissions of the staff member in question, with italics supplied (R. 115-116):

*"By the Court:*

Q. You heard what was said. Do you wish to say anything? A. My recollection of the facts as they took place on December 4th was that following Mr. Zangara being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but *I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from defendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to*

*them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.*

I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

*I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.*

I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

That is to my knowledge the full extent of the conversation.

In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done."

Facing such imminent peril of prosecution for crime, appellants requested that their counsel be permitted in the courtroom during the questioning.

As to each appellant, the Appellate Division found that: "Refusal to answer was on the sole ground that petitioner's attorney was not permitted to be present in the hearing room during the interrogation" (B. 138, 148), 6 A. D. 2d 719.

Appellants' attorney made it clear to Mr. Justice Arkwright that the claim to the right of counsel during ques-

tioning was made "under the due process clause of the Fourteenth Amendment" (R. 89).

The same claim was made by each appellant in his petition to the Appellate Division to review the determinations and mandates made by Mr. Justice Arkwright (R. 131, 132, 141, 142).

In the companion case, the Appellate Division had rested its approval of Mr. Justice Arkwright's exclusion of counsel squarely on its application of subdivision 10, Section 90, Judiciary Law, which provides that any such inquiry shall be "private and confidential," 5 A. D. 2d 790. In his answer to the petition in the Appellate Division of each appellant herein Mr. Justice Arkwright stated that he excluded counsel from the hearing room during questioning in order to maintain that "privacy" (R. 136, 146). As to each appellant, the Appellate Division held that the companion case was conclusive, and wrote (R. 138, 148), 6 A. D. 2d 719:

"Petitioner contends that special facts distinguish this proceeding from *Matter of Anonymous (M.) v. Arkwright* (5 A. D. 2d 790, motion for leave to appeal denied 4 N. Y. 2d 676) and *Matter of Anonymous (S.) v. Arkwright* (5 A. D. 2d 792) in that petitioner, prior to being called to testify, was informed that he was being called not merely as a witness but that he was being investigated and that sufficient evidence was already available to warrant presentation thereof to a Grand Jury or District Attorney. Determination unanimously confirmed, without costs."

### Summary of Argument

The reservation on the question of jurisdiction in this Court's order of November 17, 1958 (R. 174) is not crucial. Postponement of further consideration of the question of jurisdiction to the hearing of the case on the merits apparently implies that the constitutional questions presented

are substantial and important and should be decided either on this appeal or by grant of certiorari if for technical reasons appeal does not lie.

As a technical matter appeal does lie here. The New York Appellate Division construed the state statute to authorize the exclusion of counsel and the New York Court of Appeals in effect affirmed that ruling. Thus the purpose of the technical requirements for direct appeal has been met, namely, that the highest state court should be apprised of the challenge to the constitutionality of the statute on federal grounds and should have had an opportunity to construe the statute, *Wilson v. Cook*, 327 U. S. 474, 480.

At any rate, this Court can grant certiorari on the instant papers, U. S. C., Section 2103, and proceed to decision on the merits on that basis. Cf. *Sweezy v. State of New Hampshire by Wyman*, 354 U. S. 234, 236.

*Matter of Groban*, 352 U. S. 330, a five-to-four decision, was misapplied by the courts below. Exclusion of counsel from investigation of the causes of a fire by a fire marshal (*Groban*) cannot be equated with the exclusion of counsel in the instant Judicial Inquiry conducted by a Justice of the New York State Supreme Court in the calm atmosphere of a courtroom and with a large staff of counsel on one side.

The reasons upon which the prevailing view proceeded in *Groban* do not pertain here.

In *Groban* the appellants believed that "suspicion" was entertained against them, "without allegations of fact to support such belief" (p. 333). Here it stands admitted in the record that appellants had already been accused of crime by a member of the Inquiry staff.

In *Groban* it was held that "abuses" may be "corrected", for example, "by excluding from subsequent prosecutions evidence improperly obtained" (p. 334). No such



possibility of correcting abuses exists here. This evidence was taken by a "court".

In *Groban*, it was held that the presence of "advisors" might easily so far "encumber" a proceeding as to make it "unworkable or unwieldy" (p. 334). That does not apply here for two reasons: (1) counsel here would be in a "court", subject to all restraints and disciplines that a court can impose; and (2) the order for the Inquiry did not exclude the presence of counsel in all cases. There was "discretion" to allow it for one who was "himself a subject of the inquiry as to his own acts" (5 A. D. 790, 791). The question here therefore is whether the presence of counsel is a matter of constitutional right or one of mere discretion. There is no question here of counsel's presence rendering the inquiry "unworkable or unwieldy."

These are vital differences. In the concurring opinion in *Groban*, Mr. Justice Frankfurter wrote (p. 337):

"The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Grand jury procedure is not analogous. "They have no axes to grind and are not charged personally with the administration of the law," dissenting opinion of Mr. Justice Black in *Groban*, p. 347.

The privilege against self-incrimination does not constitute a substitute. The existence of one constitutional privilege is no warrant for denial of another. "And in view of the intricate possibilities of waiver," especially these appellants who are not lawyers "may easily unwittingly waive it," dissenting opinion of Mr. Justice Black in *Groban*, p. 346.

*Crooker v. California*, 357 U. S. 433, and *Cicenia v. La Gay*, 357 U. S. 504, are also not in point. They hold,

five-to-four and five-to-three, that the bare fact of a refusal by state authorities to honor a request to confer with counsel about to be retained or already retained during a period of police interrogation is of itself no violation of due process and of itself does not invalidate an otherwise *voluntary* confession so as to exclude it from evidence at the ensuing trial. Such denial of counsel, it was held, was an element of coercion to be shown against admission of the confession in evidence at the trial. Here the evidence was *not* to be *voluntary*. It was being coerced under pain of contempt. Once given to the "court", there would be no further opportunity to correct the abuse of the denial of counsel.

The fact that here Mr. Justice Arkwright on special occasion did allow appellants to leave the courtroom to consult counsel (R. 66) only emphasizes the violation of their rights. He was evidently satisfied that appellants needed the guiding hand of counsel. There can be no effective representation except in the courtroom. Appellants; who are not lawyers and who were laboring under tension of accusation of crime, could not possibly inform counsel outside with the equivalent of his own hearing and seeing. In addition, the mere presence of counsel is assurance against oppression.

The right to representation by counsel does not begin only at the "trial", but also at "any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an abuse of 'that fundamental fairness essential to the very concept of justice'", *Crooker*, page 439. Denial of counsel here was in every realistic sense an effective denial of counsel at any subsequent trial.

## POINT I

**The case is ripe for decision on this appeal or by grant of certiorari if for technical reasons appeal does not lie.**

Appellee moved to dismiss the appeal on two grounds: (1) that appeal does not lie here because the unconstitutionality of the state statute was not properly raised in the New York courts and (2) that no substantial constitutional question is presented.

Appellants opposed the motion to dismiss on the grounds (1) that appeal does lie here because the constitutionality of the statute was decided by the New York courts and (2) that a substantial and important constitutional question is involved which, failing appeal on technical grounds, ought in any event to be reviewed on the merits by grant of certiorari.

In these circumstances this Court's order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 174) would seem to reserve only the method for a decision on the merits, whether by this appeal or by grant of certiorari. In other words, this Court seemingly was satisfied that a substantial and important constitutional question is involved which should be decided on the merits, one way or the other.

### Appeal

In *Matter of Groban*, 352 U. S. 330, this Court wrote (pp. 331-332):

"The Ohio Supreme Court construed Section 3737.13 to authorize the Fire Marshal to exclude appellants' counsel from the proceeding. Since appellants' attack is on the constitutionality of that section, we have jurisdiction on appeal."

The instant case is substantially similar. Here, too, appellants attack the constitutionality of the applicable

part of subdivision 10, section 90, Judiciary Law of the State of New York. Here, too, the New York courts construed that statute to authorize the exclusion of counsel. As already appears, the instant case was decided upon the authority of the companion case. In the companion case (5 A. D. 2d 790, leave to appeal denied, 4 N. Y. 2d 676) the Appellate Division wrote (5 A. D. 790):

"The order also provided that 'for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); \* \* \*.' It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, Sec. 90)."

The dismissals by the New York Court of Appeals "upon the ground that no substantial constitutional question is involved" (4 N. Y. 2d 1034) were in effect affirmances of the Appellate Division on the merits, *Tumey v. Ohio*, 273 U. S. 510; *Matthews v. Huwe*, 269 U. S. 262.

The only distinction between the quotation from *Groban* and the instant case is that here the New York Court of Appeals did not itself write the decision which construed the statute as authorizing the exclusion of counsel, but in effect affirmed that construction by the Appellate Division. That, it is submitted, is a distinction without a difference. Substantially the situations are the same.

"The purpose" of the highest-state-court-requirement on an appeal to this court based upon repugnancy of a state statute to federal law is that the highest state court should be "apprised" in order that the highest state court should have an "opportunity authoritatively to construe" the state statute, *Wilson v. Cook*, 327 U. S. 474, 480. That purpose was fully served here. The New York Court of Ap-

peals was apprised by the Appellate Division decision that part of subdivision 10, section 90, of the Judiciary Law, has been construed and applied so as to deny counsel in the teeth of a claim of federal due process. It had an opportunity authoritatively to construe the statute. Indeed, it did so by in effect affirming the decision of the Appellate Division.

In *People of the State of New York v. Zimmerman*, 278 U. S. 63, this Court wrote upon the subject, as follows (p. 67, emphasis supplied):

*"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."*

*"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."*

The motion to dismiss states that appellants did not attack the constitutionality of the statute in the New York courts and cites *Wilson*. In *Wilson* it was held (p. 480) that in order to support an appeal to this court it must appear that the validity under federal law of the state statute, as construed and applied, "has either been presented for decision to the highest court of the state (citations), or has in fact been decided by it (citations)" (emphasis supplied).

Since, as already appears, the situation herein is the substantial equivalent of a construction by the New York



Court of Appeals that the instant statute authorized the exclusion of counsel, it is of no significance that appellants did not attack the constitutionality of the statute in the New York courts. The appeal lies under the second of the alternatives quoted from *Wilson*.

### **Certiorari**

Should this Court find that for failure to attack the constitutionality of the statute in the New York courts appeal is not available, then certiorari should be granted on the instant papers, 28 U. S. C., Section 2103, and decision should then proceed by that method. Cf. *Sweezy v. State of New Hampshire by Wyman*, 354 U. S. 234, 236.

## **POINT II**

**Exclusion of appellants' counsel from the courtroom during their questioning denied them Fourteenth Amendment due process.**

The judgments on appeal were based upon a misapprehension of the reach of this Court's decision in *Matter of Groban*, 352 U. S. 330.

In the companion case the Appellate Division relied upon *Groban*, 5 A. D. 2d 790, 791, and decided the instant cases upon the authority of the companion case, 6 A. D. 2d 719. The other case cited by the Appellate Division from 5 A. D. 2d 792, has no bearing upon the questions herein presented. There the Appellate Division reversed the contempt upon another ground.

In *Groban*, this Court held that a statute permitting a state fire marshal to conduct private investigation to determine causes of fire, insofar as it authorizes exclusion of counsel while witness testifies, is not repugnant to due process.

There were three opinions in *Groban*: a majority opinion of three written by Mr. Justice Reed; a concurring opinion by Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined; and a dissent by Mr. Justice Black, with whom the Chief Justice and Justices Douglas and Brennan joined.

There are several significant grounds upon which the instant cases differ from the majority opinion.

Mr. Justice Reed wrote (p. 333):

"The mere fact that suspicion may be entertained of such a witness, as appellants believed existed here, though without allegation of facts to support such belief, does not bar the taking of testimony in a private investigatory proceeding."

In the instant cases it is not a matter of "suspicion" only by the authorities and not a mere "belief" by appellants without allegations of fact to support it. Here it stands admitted on the record that before appellants were questioned they had been told by a member of the Inquiry staff that sufficient evidence had already been gathered against them of a *prima facie* case of *crime* that was ready to be sent to the District Attorney.

Mr. Justice Reed further wrote (334):

"Possibility of improper exercise of opportunity to examine is not in our judgment a sound reason to set aside a State's procedure for fire prevention."

There is here no such attendant urgency as that involved in investigating the cause of a fire. This inquiry is conducted by a Justice of the Supreme Court in the calm atmosphere and with all the paraphernalia of a courtroom and with a large staff of counsel on one side. The power exercised here is not administrative, but judicial. The punishment here was meted out by a "court" for "refusal . . . ; after being sworn, to answer any legal and proper

interrogatory". See Judiciary Law, Section 750, subdivision 5. A court is the one place in the world where a person accused should not be denied counsel.

Mr. Justice Reed further wrote (p. 334):

"As in similar situations abuses may be corrected as they arise, for example, by excluding from subsequent prosecutions evidence improperly obtained."

Here there would be no possibility of correcting any such abuse. Here the evidence is taken by a "court". There is no conceivable basis upon which evidence so taken may be excluded from subsequent prosecutions. Unless the parties have the guiding hand of counsel at the time the evidence is first given, they are forever deprived of correcting any abuse that may be involved.

Finally, Mr. Justice Reed wrote (p. 334):

"Ohio, like many other States, maintains a division of the state government directed by the Fire Marshal for the prevention of fires and reduction of fire losses. Section 3737.13, which has been in effect since 1900, represents a determination by the Ohio Legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy."

No such possibility exists here. Counsel for persons questioned here would be in a "court", subject to all restraints and disciplines that a court can impose. Indeed the order for the Inquiry here did not exclude the presence of counsel for persons questioned in all cases. In the companion case, 5 A. D. 2d 790, the Appellate Division wrote (p. 791):

"In its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct."

The question here, therefore, is not one of the presence of counsel to the person examined encumbering the proceeding so as to make it unworkable or unwieldy. The presence of such counsel in exceptional cases was envisioned in the order itself.

The question here is whether the presence of such counsel is a matter of constitutional right or of mere "discretion". In the companion case the Appellate Division wrote that the person examined was himself the subject of inquiry as to his own alleged "acts of professional misconduct". A distance separates "professional misconduct" by a lawyer from crime. *People ex rel. Karlin v. Culkin*, 248 N. Y. 465. In the cited case, Chief Judge Cardozo wrote (p. 470):

"The precise question to be determined is whether there is power in the Appellate Division to direct a general inquiry into the conduct of its own officers, the members of the bar, and in the course of that inquiry to compel one of those officers to testify as to his acts in his professional relations. The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes."

Here, appellants were asked to testify after they had already been informed by a member of the Inquiry staff that a *prima facie* case of crime had already been established against them and was ready to be sent to the District Attorney for prosecution. Here, the presence of their

counsel during the questioning was a constitutional right of due process.

The instant cases also differ from the concurring opinion in *Groban*.

Mr. Justice Frankfurter there wrote that the Ohio statute was not directed to the "examination of suspects" (p. 336). Here, before the examination, the appellants had already been accused of crime. Mr. Justice Frankfurter further wrote that in *Groban* there was an "administrative inquiry . . . *in camera*" (p. 336). Here there was a judicial inquiry in court. Lastly, Mr. Justice Frankfurter wrote (p. 337):

"The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process."

Here there are differences from *Groban* and they are vital and should be recognized so as to accord to appellants due process.

The four dissenters in *Groban* were of opinion that even on the facts of that case there was a denial of due process. They thought that even *Groban* (p. 338)

"disregards 'this nation's historic distrust of secret proceedings' and decides contrary to the general principle laid down by this Court in one of its landmark decisions that an accused . . . requires the guiding hand of counsel at every step in the proceedings against him'."

Descending to the particulars of the *Groban* case, Mr. Justice Black wrote (p. 344):

"I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which



may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him. The broader implications of these decisions seem to me to support appellants' right to use their counsel when questioned by the Deputy Fire Marshal. It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. It is quite possible that the conviction of a person charged with arson or a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination."

Then, answering a suggestion that the privilege against self-incrimination is ample protection, he wrote (pp. 345-346):

"The average witness has little if any idea when or how to raise any of his constitutional privileges. There is no requirement in the Ohio statutes that the fire-prevention officers must inform the witness that he is privileged not to incriminate himself. And in view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it. If the witness is coerced or misled by his interrogators he may not dare to raise the privilege. Undoubtedly he will be made aware that hanging over his head at all times is the officer's power to punish him for contempt—a power whose limitations the witness will not understand."

Answering a suggestion that grand jury procedure is relevant, he further wrote (pp. 346-347):

"But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury."

Mr. Justice Black concluded thus (p. 353):

"Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea wherever and whenever carried out remains unchanging—extraction of 'statements' by one means or another from an individual by officers of the state while he is held incommunicado."

Two more cases on the right to counsel decided by this Court at end of term require comment.

*Crooker v. California*, 357 U. S. 433, and *Cicenia v. La Gay*, 357 U. S. 504, held that the bare fact of refusal by state authorities to honor a request to confer with counsel about to be retained or already retained during a period of police interrogation is of itself no violation of due process. There was division in both, five to four and five to three, Mr. Justice Brennan abstaining in the latter.

These cases also do not reach the questions presented by the instant cases.

In *Cicenia*, this Court held that the claim of right to confer with counsel there had been "disposed of by *Crooker*", 357 U. S. 508.

In *Crooker*, the questions presented were thus stated by this Court (p. 434):

"Petitioner, under sentence of death for murder of his paramour, claims that his conviction in a California court violates Fourteenth Amendment due process of law because (1) the confession admitted into evidence over his objection had been coerced from him by state authorities, and (2) even if his confession was voluntary it occurred while he was without counsel because of the previous denial of his request therefor."

This Court there found that the confession was "voluntary" (p. 438). The Court pointed to the evidence that (p. 437):

"Before being transferred to the West Los Angeles Police Station he was advised by a police lieutenant, 'you don't have to say anything that you don't want to,' \* \* \*."

Then this Court there disposed of the second contention (p. 439):

"that the use of any confession obtained from him during the time of such denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner fails to sustain the first point, and therefore we do not reach the second."

In other words, this Court there held that such denial of counsel may be an element of coercion which may be shown at the trial in impeachment of the voluntariness of the confession.

In both respects the instant cases differ from the last cited cases. Here the evidence was not to be "voluntary".

Appellants were under coercion of subpoena on pain of contempt to give their evidence. Here, moreover, there would be no way of correcting any abuse of their rights at a subsequent prosecution. The evidence, it has already been shown, would be taken by a "court" and unless appellants have the guiding hand of counsel at the time the evidence is first given, they would forever be deprived of correcting any abuse that may be involved.

The fact that here appellants were allowed on special occasion (R. 66) to leave the courtroom and consult their counsel only emphasizes the violation of their rights. It shows that Mr. Justice Arkwright was evidently satisfied that they needed the guiding hand of counsel. That being so, he should have permitted representation in the courtroom where alone it could be effective. Outside, counsel is without direct knowledge of the course of proceedings. Appellants are not lawyers. They were under tension of an accusation of crime. They could not possibly inform counsel outside with the equivalent of his own hearing and seeing. Even so appellants were deprived of another benefit of having counsel present. The mere presence of counsel is assurance against oppression.

The instant cases fall squarely within the following portion of this Court's opinion in *Crooker* (p. 439):

"Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler v. Fretag, supra*, but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'."

## CONCLUSION

The orders of the New York Court of Appeals should be reversed and the contempt determinations and mandates made by Mr. Justice Arkwright should be annulled.

Respectfully submitted,

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**BRIEF  
for  
APPELLEE**

FILED  
FEB 27 1959

JAMES R. BROWNING, Clerk

**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**NO. 378**

**ANONYMOUS NOS. 6 AND 7**

*Appellants,*

**v.**

**HON. GEORGE A. ARKWRIGHT, as Justice of the  
Supreme Court of the State of New York,**

*Appellee.*

**APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK**

**BRIEF FOR APPELLEE**

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# INDEX

	PAGE
Opinions Below .....	1
Jurisdiction .....	2
Statement of the Case .....	2
The Origin of the Inquiry or Investigation	
The Role of the Brooklyn Bar Association ...	3
The Order of the Appellate Division Directing a Judicial Inquiry and Investigation .....	4
Authority for the Investigation .....	5
The Breadth and Scope of the Investigation ...	7
The Appellants and Their Relation to the Inves- tigation .....	7
The Question on the Merits .....	12
Summary of Argument .....	13
Argument:	
I—This Court is without jurisdiction to pass upon the constitutionality of the New York Statute (Judiciary Law § 90, subd. 10). The appel- lants never raised or attacked the constitution- ality of the statute in the state courts nor was the constitutionality of the statute ever passed upon or determined by the state courts in the cases at bar .....	14
II—The due process clause of the Fourteenth Amendment does not give the appellants, as witnesses, the right to be represented by coun- sel in the hearing room while testifying in a preliminary fact finding investigation .....	16
Conclusion .....	26

## Table of Cases

	PAGE
Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 416	16
Continental Baking Co. v. Woodring, 286 U. S. 352 ..	16
Corporation Comm'n v. Lowe, 281 U. S. 431 .....	16
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282 ....	16
Federation of Labor v. McAdory, 325 U. S. 450 ....	16
Hall v. Geiger-Jones Co., 242 U. S. 549 .....	16
Matter of Anonymous, N. Y. L. J., June 23, 1958, p. 1 (USDCEDNY) .....	21
Matter of Bar Association of the City of New York, 222 App. Div. 580 .....	16
Matter of Brooklyn Bar Association, 223 App. Div. 149 .....	17
Matter of C. Anonymous, 6 App. Div. 2d 1045 .....	17
Matter of Groban, 352 U. S. 330 .....	13, 16, 19, 21, 22, 23
Matter of M. Anonymous v. Arkwright, 5 App. Div. 2d 790, leave to app. den., 4 N. Y. 2d 676 .....	10, 15, 17, 19, 20
People ex rel. Karlin v. Culkin, 248 N. Y. 465 .....	17, 18
People ex rel. McDonald v. Keeler, 99 N. Y. 463 ....	19
Rubin v. State, 216 N. W. 513 .....	18
Wilson v. Cook, 327 U. S. 474 .....	14

## Statutes

New York State Civil Practice Act, Art. 78 .....	2
New York State Civil Practice Act, § 588(1a) .....	2
New York State Civil Practice Act, § 588 .....	15
28 U. S. C. § 1257(2) .....	2, 14
28 U. S. C. § 2103 .....	2
New York State Judiciary Law, § 90 .....	5, 6, 17

New York State Judiciary Law, § 90(1a) .....	5
New York State Judiciary Law, § 90(2) .....	5, 6
New York State Judiciary Law, § 90(6) .....	6, 7
New York State Judiciary Law, § 90(7) .....	6
New York State Judiciary Law, § 90(10) .....	5, 6, 12, 13, 14, 15, 16
New York State Civil Practice Act, § 589 .....	15
New York State Civil Rights Law, § 73 .....	20

### **Other Authorities**

New York State Legislative Record and Index, 1958 .....	21
Clevenger's Annual Practice of New York, 1958, Court Rules .....	6

### **APPENDICES:**

Appendix A (Order of the Appellate Division Dated January 21, 1957 Authorizing a Judi- cial Inquiry and Investigation) .....	27
Appendix B (Section 90 of the Judiciary Law— Pertinent Provisions) .....	30
Appendix C (Pertinent Excerpts from Report of Mr. Justice Arkwright Filed in the Appel- late Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958) .....	33
Appendix D (Opinion in Matter of M. Anony- mous v. Arkwright, 5 App. Div. 2d 790, Leave to Appeal Denied in 4 N. Y. 2d 676) .....	38
Appendix E (Section 73 of the New York State Civil Rights Law—Pertinent Provisions) .....	41
Appendix F (Proposed Legislation to amend the New York State Civil Rights Law, which failed of passage) .....	43



# Supreme Court of the United States

October Term, 1958

NO. 378

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ANONYMOUS NOS. 6 AND 7,

*Appellants,*

v.

HON. GEORGE A. ARKWRIGHT, as Justice of the Supreme  
Court of the State of New York,

*Appellee,*

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APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## BRIEF FOR APPELLEE

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### NATURE OF PROCEEDING

and

### OPINIONS BELOW

Appellants were subpoenaed to appear as witnesses in a preliminary fact finding inquiry or investigation ordered by the Appellate Division of the Supreme Court of the State of New York into alleged misconduct by attorneys and by other persons acting in concert with them. Appellants were adjudged guilty of a criminal contempt for refusing to answer questions at the inquiry. Appellants based their refusal to answer on the sole ground that their

attorney was not permitted to be present in the hearing room during the interrogation (R. 7-15, 36-45).

Through the medium of a petition under Article 78 of the New York Civil Practice Act, appellants instituted a proceeding in the Appellate Division to review the determinations adjudging them in contempt. In a memorandum decision reported in 6 A. D. 2nd 719 (R. 138, 148), the Appellate Division unanimously confirmed the determinations and orders of contempt.

Appellants then sought to appeal as of right to the Court of Appeals of the State of New York pursuant to the provisions of Section 588, subdivision 1(a) of the Civil Practice Act. This statute permits an appeal as of right where a federal constitutional question is directly involved. Upon appellee's motion, the Court of Appeals unanimously dismissed the appeals "upon the ground that no substantial constitutional question is involved", 4 N. Y. 2nd 1034 (R. 159-162).

## **JURISDICTION**

The jurisdiction of this court to review these cases by direct appeal is invoked by appellants under Title 28 U. S. C. § 1257, subdivision 2 (R. 163-174). Failing that, "appellants invoke this court to treat the papers as applications for writs of certiorari under 28 U. S. C., Section 2103" (Appellants' Brief, p. 4). Further consideration by this court of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 174; 79 S. Ct. 151).

## **STATEMENT OF THE CASE**

We believe that the question of jurisdiction and the constitutional issue of due process sought to be projected by the appellants can be better considered in the light of an

extended statement of the case. . The material facts are not in dispute. The controversy before this court arises only by reason of the opposing views of counsel for the parties as to the applicability of any constitutional question.

***The origin of the inquiry or investigation.***

***The role of the Brooklyn Bar Association.***

The investigation has its genesis in a petition \* of the Brooklyn Bar Association sworn to December 11, 1956 and addressed to the Appellate Division of the Supreme Court of the State of New York, Second Department. As stated in its certificate of incorporation the purpose, among others, of the Brooklyn Bar Association is to elevate "the standard of integrity, honor and courtesy in the legal profession". Based on an investigation conducted by the Bar Association in 1956, the Association alleged in its petition to the Appellate Division that there was "solicitation by attorneys of their employment to prosecute damage cases on a contingent fee basis" with the following indicated results:

"7. That such practices result in the following: unfair agreements of retainer; maintenance by lawyers of some system of obtaining prompt information of accidents; congestion of court calendars by unworthy causes which are never intended to be brought to trial; a false conception by lawyers engaged in this practice that the relationship between attorney and client is a commercial transaction in which the interest of the client plays an unimportant part; impairment of public confidence in the Courts; and delay in the administration of justice."

Accordingly, the Association "requested that a judicial inquiry be made into the practices alleged and into any

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\* The petition is referred to in the order of the Appellate Division dated January 21, 1957 directing and authorizing the current inquiry (R. 27-29, 57-59).

other illegal or improper practices, and that upon the conclusion of such inquiry any person found to have been participating in any such practices be brought into court for such action as is contemplated by law."

***The order of the Appellate Division directing a Judicial Inquiry and Investigation.***

Acting upon the petition of the Brooklyn Bar Association, the Appellate Division made an order dated January 21, 1957 (R. 27-29, 57-59)\* directing that a judicial inquiry and investigation be made:

"(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

"(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

"(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

"(4) With respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them;"

The order further provides that the investigation shall be conducted by Supreme Court Justice George A. Arkwright\*\* at an Additional Special Term of the Supreme

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\* The complete text of the Order is reproduced as Appendix A hereof.

\*\* By reason of attaining the statutory age limit, Mr. Justice Arkwright retired on December 31, 1958. In his place the Appellate Division has designated Supreme Court Justice Edward G. Baker.

Court, aided by Denis M. Hurley, Esq., an attorney designated by the Brooklyn Bar Association.

Consistent with the provisions of Section 90, subd. 10 of the Judiciary Law, the order directs that the investigation shall be conducted in private.

Lastly, the order provides that the Justice conducting the inquiry shall file with the Appellate Division his report setting forth his proceedings, his findings and his recommendations.

To the foregoing we make the observation that nowhere in Section 90 is there any provision granting either a witness or a party under inquiry a right to have counsel present in the hearing room during interrogation. We shall discuss this at more length, *infra*.

#### ***Authority for the Investigation.***

The authority of the Appellate Division to order the investigation is unchallenged. It is vested in the Court by statute (New York State Judiciary Law, Section 90).\*

Subdivision 1(a) of Section 90 represents a broad grant of power to the Appellate Division to determine if a person possesses the requisite character and fitness for admission to the Bar.

Subdivision 2 of Section 90 authorizes the Appellate Division to censure, suspend from practice or remove from office any attorney "who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice".

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\* The pertinent provisions of Section 90 of the Judiciary Law are quoted in Appendix B hereof.



Subdivision 6 of Section 90 provides that an attorney may not be suspended or removed until he has first been served with charges and he must be allowed an opportunity to defend himself. This subdivision also provides that the expenses of any preliminary investigation shall be paid by the appropriate government unit. With relation to the current inquiry, this means the City of New York.

Under subdivision 7 of Section 90, the duty to prosecute an attorney on charges of misconduct devolves upon the appropriate district attorney, when so designated by the Appellate Division, or upon an attorney approved by a Bar Association and thence appointed by the Appellate Division.

Subdivision 10 of Section 90 is designed to insure secrecy and privacy of the investigation.

To complement Section 90, the Appellate Division has promulgated special rules regulating the conduct of attorneys in its Judicial Department. For example, with respect to so-called "negligence cases" handled by the attorney on a contingent fee basis, Rule 3 requires the attorney to file a statement or notice of retainer with the Clerk of the Appellate Division setting forth, *inter alia*, the date of retainer, the terms of compensation, home address of the client, date of occurrence of injury, whether the client was personally known to the attorney and the name of any person who referred the client or who had any connection with referring the client to the attorney, stating the connection. Violation of the rules is deemed professional misconduct within the meaning of Section 90, subd. 2 of the Judiciary Law (Clevenger's Annual Practice of New York, 1958, Court Rules, pp. 21-18 to 21-19).

### ***The Breadth and Scope of the Investigation.***

In a preliminary report dated and filed June 11, 1958 with the Appellate Division, Mr. Justice Arkwright summarized the activities of the investigation to the date of the report. The full text of the report was published on page 1 of the New York Law Journal of June 23, 1958. Appellants have quoted parts of the report in their respective affidavits in the Court of Appeals (R. 149-158), and in their brief herein (page 7). So that this court may have a more complete picture of the different proceedings and activities of the investigative inquiry, the pertinent parts of Mr. Justice Arkwright's report are appended hereto as Appendix C.

The magnitude of the investigation is perhaps best reflected by some of the statistical data in Mr. Justice Arkwright's report. Quite apart from the diverse legal proceedings that ensued from the investigation, and the number of disciplinary proceedings that were recommended to be instituted against various attorneys, it appears that no less than 2,500 witnesses were screened by the Inquiry's investigative staff to June 11, 1958. Of these witnesses, 726 were questioned at some length before Mr. Justice Arkwright. To say that the progress of the Inquiry would have been delayed and the proceedings rendered unwieldy and ineffectual, if that many witnesses had been permitted the presence of counsel, would be to understate the case. We add this further practical consideration. To permit witnesses the presence of counsel in the hearing room would add unduly to the costs of the investigation. To date the recorded costs of the Inquiry exceed \$400,000 payable by the City of New York (Judiciary Law, Section 90, subdivision 6).

### ***The Appellants and Their Relation to the Investigation.***

The stenographic record of the hearings during the investigation relating to the appellants is contained at

page 59 et seq. of the Record herein. As an aid to the court we shall seek to summarize the salient features of the preliminary hearings.

The appellants are New York State licensed private detectives and investigators doing business under the trade name of Gotham Claims Bureau (R. 61, 130, 140). Pursuant to subpoena, the appellants, accompanied by their attorney, appeared as witnesses before the Judicial Inquiry on December 4, 1957. Upon the request of their attorney, appellants were granted an adjournment of their scheduled examination before the Justice presiding at the Inquiry pending a decision by the Appellate Division in an entirely unrelated case on the question of the right of a witness to be attended by counsel in the Inquiry (R. 61, 110). After leaving the hearing room, appellants and their attorney informally inquired of an assistant counsel for the Inquiry as to the Inquiry's interest in the appellants (R. 110, 115). As a "favor" and "off the record" (R. 116), the assistant counsel explained the Judicial Inquiry's interest. This was explained in sworn testimony given by the assistant counsel. We quote from the Record (R. 115-116):

"My recollection of the facts as they took place on December 4th was that following Mr. Zangara [attorney for the appellants] being before the Court and asking for an adjournment, that he and his clients approached me in the outer foyer outside the courtroom and Mr. Zangara, as spokesman for the group, asked me exactly what was wanted of his clients in this matter. I, at that time, told Mr. Zangara that all—I don't know my exact language, but I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service had, with some frequency, obtained statements from de-

fendants, holding themselves out to be from the defendant's carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

"I told Mr. Zangara that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

"I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

"I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

"That is to my knowledge the full extent of the conversation.

"In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor and that the Appellate Division would finally rule as to what would actually be done.

"The Court: All right. Any questions?

"Mr. Zangara: No, your Honor."

Subsequent to the appearance of the appellants and their attorney before the Judicial Inquiry on December 4, 1957, the Appellate Division squarely held in the pending case (not involving these appellants) that the exclusion of counsel from the hearing room during interrogation was not a violation of any constitutional rights (*Matter of M. Anonymous v. Arkwright*, 5 App. Div. 2d, 790-792)\*. Motion for leave to appeal from the decision of the Appellate Division was denied by the Court of Appeals on April 3, 1958 (4 N. Y. 2d 676).

On April 22, 1958—more than four months after they procured an adjournment of their scheduled examination—the appellants, with their attorney, again appeared at the Judicial Inquiry. At the very outset, both Mr. Justice ~~Arkwright~~ and Chief Counsel Denis M. Hurley advised the appellants and their attorney of the foregoing holding by the Appellate Division that there was no constitutional right to counsel during interrogation (R. 61, 64). And at another point the following colloquy took place with one of the appellants (R. 78):

“The Court: Well you were informed here—your counsel was informed, and I so inform you again that that has been ruled upon by the Appellate Division, and that counsel at my direction may or may not be allowed in the room while a witness is being examined.

“I have ruled here that in this case, and in all that have been before me, that counsel will not be allowed in the room while a witness is being examined.

“I am telling you that and you may be guided accordingly now. You have your counsel, so you take your advice from your counsel. I assume you

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\* For the convenience of the court we reproduce the opinion of the Appellate Division as Appendix D hereof.



have gone over it very carefully with him. He is outside.

"The Witness: I haven't gone over it as carefully as I would have liked to.

"The Court: If you wish to go out, I will suspend for a few minutes and let you go out.

"The Witness: No, your Honor, because I understand that the United States Supreme Court has not ruled on it yet.

"The Court: All right, go ahead, Mr. Hurley. You don't wish to go out then?

"The Witness: No, sir."

Nevertheless, the appellants persisted in their refusal to answer a series of questions that were clearly within the scope of the inquiry. They persisted in such refusal even after being afforded full opportunity to confer with their counsel. Further, the appellants were advised time and again that they were subpoenaed to appear as witnesses—not as defendants—and that "Nobody is accused here of anything" (R. 63, 65-67, 72, 78, 87, 93, 96, 98, 101).

After the fruitless examination of appellants on April 22, 1958 they were directed to return with their attorney on April 24, 1958 (R. 83-84). The same results ensued on April 24. The appellants were asked in verbatim some of the very questions which had been asked of them on April 22 (R. 66-83, 96-99, 101-106). The questions generally sought to elicit information as to the type of work appellants did in their firm, Gotham Claims Bureau; whether such work was in the nature of conducting investigations for lawyers; whether appellants had done investigations for certain named attorneys (who were being investigated by the Judicial Inquiry); whether appellants had referred cases to those attorneys (R. 96-99, 101-106). Appellants refused to answer each of these questions, again

on the ground that they were being deprived of their alleged right to be represented by counsel in the hearing room. Appellee thereupon held each appellant in contempt of court (R. 99-100, 106-107). There ensued the litigation in the State courts and the appeal by the appellants to this court.

## THE QUESTION ON THE MERITS

Quite apart from the question of jurisdiction, which we shall discuss under *POINT I* of our Argument, *infra*, the basic question is:

By virtue of the due process clause of the Fourteenth Amendment to the Federal Constitution, do the appellants have a constitutional right to counsel in the hearing room while they are being interrogated as witnesses in a non-adversary, non-prosecutorial, preliminary fact finding inquiry into alleged unethical practices of attorneys and others acting in concert with them?

A factual ingredient of the question is that in any event the appellants were granted permission to interrupt the examination, leave the hearing room, and receive the advice of their attorney as to the very questions asked of them during the examination.

We cannot let pass unnoticed appellants' concept of the questions involved as formulated by their counsel (Appellants' Brief, pp. 5-6). The question of the constitutionality of Section 90, subd. 10, of the Judiciary Law was never raised by the appellants nor passed upon in these cases by the State courts. We shall so demonstrate, *infra*.

## SUMMARY OF ARGUMENT

In the state courts, the appellants did not raise or attack the constitutionality of Section 90 (subd. 10) of the Judiciary Law. Nor was the constitutionality of that statute construed or passed upon by the state courts in these cases. Accordingly, the statute is immune from any constitutional question before this court.

It is clear that the appellants were subpoenaed to appear as witnesses in a preliminary fact finding, non-adversary and non-prosecutorial inquiry. The Inquiry results in no final adjudication or determination affecting these appellants. By statute (Judiciary Law, § 90, subd. 10) the Inquiry is secret and confidential. Under such circumstances there is no denial of due process under the Fourteenth Amendment.

*Matter of Groban*, 352 U. S. 330, is dispositive of the constitutional questions sought to be projected by the appellants herein.

Although the appellants were not entitled to representation by counsel in the hearing-room—either by constitutional or statutory right—they were nevertheless afforded ample opportunity to consult with counsel so that their rights were fully preserved and protected at all stages of the Inquiry.

## POINT I

**This Court is without jurisdiction to pass upon the constitutionality of the New York Statute (Judiciary Law § 90, subd. 10). The appellants never raised or attacked the constitutionality of the statute in the state courts nor was the constitutionality of the statute ever passed upon or determined by the state courts in the cases at bar.**

## (1)

Appellants seek to invoke the jurisdiction of this court under Title 28 U. S. C. § 1257(2) as a direct appeal from a final judgment or order of the highest court of the state. In our view this much is certain on the question of jurisdiction: For the first time, appellants now contend that the New York Statute (Judiciary Law § 90, subd. 10) is unconstitutional in that it is allegedly repugnant to the due process clause of the Fourteenth Amendment (Appellants' Brief pp. 5-6). The vulnerability of appellants' position is that the question of the constitutionality of the New York Statute was never raised by them in the state courts nor was it ever passed upon or decided by the state courts in the cases at bar. The Record supports us in these assertions.

In their original petitions in the Appellate Division to review the orders adjudging them in contempt (R. 130, 140), neither appellant mentioned or referred in any way to § 90, subd. 10 of the Judiciary Law. Similarly, on their appeals to the Court of Appeals, the appellants were completely silent on the question of the constitutionality of the statute (R. 17-26, 47-56, 149-158). It is in this court that the appellants for the first time attack the constitutionality of the state statute. In that posture of the case, we submit that this court should deny jurisdiction. *Wilson v. Cook*, 327 U. S. 474, 480, 482.

## (2)

In rather indirect fashion, counsel for the appellants states at page 3 and elsewhere in his Brief that Section 90, Sub. 10 of the Judiciary Law was expressly construed by the Appellate Division in "the companion case" of *Matter of M. Anonymous v. Arkwright*, 5 App. Div. 2d 790, leave to appeal denied in 4 N. Y. 2d 676. The case of *M. Anonymous* and the cases at bar are altogether unrelated. Concededly, both cases arose out of the same investigation. However, they do not thereby become "companion cases". The parties in both cases are different and each case was properly decided upon its own facts. The opinion in *M. Anonymous* was rendered by the Appellate Division on January 27, 1958; the opinions by the Appellate Division in the cases at bar were rendered on May 26, 1958. Nor may the case of *M. Anonymous* be treated as a "companion case" solely because the Appellate Division cited the authority of that case in its decisions dismissing the petitions of the appellants herein.

In any event, these appellants can derive no comfort from the case of *M. Anonymous*. There, as in the instant cases, the constitutionality of § 90, subd. 10 of the Judiciary Law was never passed upon nor was it ever presented for decision to the Appellate Division. Counsel for *M. Anonymous* recognized that such was the situation because he moved in the Court of Appeals for leave to appeal to that court from the Appellate Division decision (Civil Practice Act, Section 589), instead of appealing as of right on the ground that a constitutional question was involved (Civil Practice Act, Section 588). Accordingly, not by the remotest degree of kinship, can these appellants obtain a review of their cases in this court through their attempted adoption of the so-called "companion case" of *M. Anonymous*.



As stated by this court in *Federation of Labor v. McAdory*, 325 U. S. 450 (1945), it has long been the considered practice of the court not (p. 461) "to decide any constitutional question except with reference to the particular facts to which it is to be applied, *Hall v. Geiger-Jones Co.*, 242 U. S. 549, 554; *Corporation Comm'n v. Lowe*, 281 U. S. 431, 438; *Continental Baking Co. v. Woodring*, 288 U. S. 352, 372; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 429-30."

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282 (1921), this court similarly said (p. 289):

"A statute may be invalid as applied to one state of facts and yet valid as applied to another."

On the jurisdictional feature, counsel for the appellants asserted on page 14 of his Brief that "The instant case is substantially similar" to *Matter of Groban*, 352 U. S. 330. That is manifestly not so. In the *Groban* case, there was a direct attack on the constitutionality of the Ohio statute in the courts of that state. The constitutionality of the New York statute (Judiciary Law § 90, subd. 10) was never attacked below.

## POINT II

The due process clause of the Fourteenth Amendment does not give the appellants, as witnesses, the right to be represented by counsel in the hearing room while testifying in a preliminary fact finding investigation.

### (1)

#### *Purpose of inquiry; its characteristics.*

Investigations or inquiries of the kind here involved are neither novel nor of recent vintage. Over the years, since 1928, there have been comparable inquiries into allegations of professional misconduct of lawyers. The inquiries have uniformly received judicial sanction. *Matter of Bar Association of the City of New York*, 222 App. Div. 580; *Matter of*

*Brooklyn Bar Association*, 223 App. Div. 149; *People ex rel. Karlin v. Culkin*, 248 N. Y. 465.

The question as to whether a witness in such an investigation has a constitutional right to have counsel physically present in the hearing room during the interrogation is dependent in a large measure upon the nature of the investigation and the purposes thereof. In our Statement of the Case, page 2 *et seq.*, *ante*, we referred to some of the factors inherent in the instant investigation. For purposes of the immediate discussion we recapitulate the chief characteristics of the current inquiry:

(a) Inquiry shall be made into alleged improper, corrupt and unethical practices by attorneys and others acting in concert with them and "with respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them" (Order of the Appellate Division made January 21, 1957; Judiciary Law § 90; Appendix A and Appendix B hereof, respectively).

(b) The justice conducting the investigation shall make and file with the Appellate Division "his report setting forth his proceedings, his findings and his recommendations" (Last paragraph of Order of Appellate Division, *supra*). Thus, the role of the justice presiding over the investigation is that of a preliminary fact-finder. He is not a prosecutor. He may neither formulate nor prosecute any charges. This would be beyond the scope of the Appellate Division order. Indeed, in another case that was an outgrowth of the current investigation, the Appellate Division held that "The result of the inquiry and investigation as to petitioner would be merely a report and recommendation as to future action, and would not be a final determination as to him". *Matter of M. Anonymous*, 5 App. Div. 2d 790; Appendix D hereof.

(c) The investigation is not a criminal proceeding. *Matter of C. Anonymous*, 6 App. Div. 2d 1045.

(d) "For the purpose of protecting the reputation of innocent persons", the investigation shall be conducted in private, and all papers relating thereto, except upon order of the court, shall be deemed confidential (Appendix A and Appendix B hereof). In this respect the investigation is akin to a Grand Jury proceeding. *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 479.

In summary, an inquiry of the kind here involved has been denominated as a quasi-administrative, preliminary investigation, without adversary parties, neither ending in any decree nor establishing any right (*Karlin case, supra*, at p. 479). It is not a proceeding against any particular person; it is non-prosecutorial. Rather, it is a proceeding against an offending practice. *Rubin v. State*, 216 N. W. 513, 516; *Matter of Brooklyn Bar Association*, 223 App. Div. 149, 151.

## (2)

### ***Why appellants, as witnesses, were summoned to testify.***

In the nature of things an investigation into the conduct of attorneys could not be effective if only those lawyers being investigated were called as witnesses. Others with relevant information, including non-lawyers, must also give testimony. That is why appellants were summoned to testify. In the investigation of certain lawyers, some of whose names appear on the record (R. 69, 75, 81, 82), information was discovered which indicated that appellants might be possessed of knowledge relevant to the investigation of those attorneys and perhaps others as well. The tampered statements seemed to be connected with appellants and appellants were summoned "• • • to find out if these statements were actually taken by the Gotham Claims Service (sic), *for what attorneys the statements were taken*, and whether the tampering was done by them or their employees or *at the direction of some attorney*" (R. 115; italics added). It is true that the Judicial Inquiry was interested in determining what appellants had done, but it is also true that it was more

interested in receiving their testimony in that regard because this might shed light on what had been done by attorneys under investigation.

(3)

***Witnesses have no right to counsel.***

In considering the appellants' asserted constitutional right to counsel, it must be borne in mind that they were sought to be questioned at the Inquiry solely in their capacity as *witnesses*. They were repeatedly apprised of that fact. For example, see R. 63, 72, 73, 87. The law is well established that appellants, as witnesses, have no right to counsel. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *Matter of M. Anonymous*, 5 App. Div. 2d 790, leave to appeal denied 4 N. Y. 2d 676 (Appendix D hereof); *Matter of Groban*, 352 U. S. 330. In the *McDonald* case the Court of Appeals held a witness who had been subpoenaed before a legislative committee guilty of contempt for refusing to testify unless he was attended by counsel. In language that is particularly apt to the case at bar the Court of Appeals stated at pages 484-485:

"His refusal to be further examined, or to remain in attendance, was placed upon the ground that the committee refused to recognize his right to be attended by counsel and act under his advice in answering questions, but we are of opinion that he had no constitutional or legal right to the aid of counsel on such examination. The constitutional provision on the subject is that 'in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.' (Const., art. 1, § 6.) This provision has been very liberally construed and held to apply to trials before any authority having jurisdiction to try, and in *People ex rel. Mayor, etc. v. Nichols* (79 N. Y. 582), this court held that a police commissioner, appearing before the Mayor of the city of New York to show cause why he should not



be removed for cause, pursuant to the statute, was entitled to defend by counsel. But here the relator was not on trial, nor was he a party, but he was a mere witness called upon to testify in relation to charges against another person, and there was no trial pending against any one. As well might a witness, examined before a grand jury conducting an investigation of a charge against another person, with a view of his indictment, claim the right to be attended by counsel. We do not think that a mere witness has that right."

(4)

***The expressed policy of New York State.***

By act of the New York State Legislature in 1954, a witness summoned to a hearing before certain named agencies of the government, has been accorded the right to be accompanied by counsel (New York State Civil Rights Law, § 73).<sup>\*</sup> However, the law does not encompass an investigation of the kind that is here involved. *Matter of M. Anonymous, supra.*

Legislative recognition of the inapplicability of Section 73 of the Civil Rights Law to the current Inquiry is not lacking. During the 1958 session of the New York State Legislature, a Bill was introduced in the Assembly (A. Int. 3210, Pr. 3347, Austin) to amend the State Civil Rights Law.<sup>\*\*</sup> If enacted, the Bill would have granted the right of representation by counsel to persons called as witnesses "before any judge, arbitrator, referee or other person heretofore or hereafter authorized or directed to conduct any inquiry or investigation, whose testimony may tend to involve himself or any other person in any subsequent criminal or quasi-criminal prosecution or in any subsequent disciplinary proceeding for professional misconduct, or whose testimony may subject himself or any other person

<sup>\*</sup> The text of this statute is annexed as Appendix E.

<sup>\*\*</sup> A copy of this Bill is annexed hereto as Appendix F.



to any forfeiture, fine, penalty, or the revocation or suspension of any license to engage in a profession, trade or business". The Bill, of course, would have applied to the instant investigation. The Bill failed of passage (New York State Legislative Record and Index, 1958, p. 617). At the moment, therefore, the public policy of the State of New York, expressed through the duly elected representatives of the people in the State Legislature, is that witnesses summoned to an inquiry such as the one here involved have no right to counsel. There may be those who disagree with the wisdom of such legislation or, rather, lack of legislation. However, and we believe quite properly, the "wisdom" of legislative policy does not come within the orbit of judicial adjudication of a constitutional issue.

## (5)

***The Groban case is dispositive of appellants' contentions.***

We regard the decision of this court in *Matter of Groban*, 352 U. S. 330,\* as decisively rejecting the very contentions advanced by the appellants herein. The features of both cases, insofar as they project a constitutional issue, are strikingly analogous. In the language of this court, the *Groban* proceeding "was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to 'determine whether the fire was the result of carelessness or design', and to arrest any person against whom there was sufficient evidence on which to base a charge of arson".

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\* We point out that the *Groban* case has also been cited in a Federal district court as authority for the proposition that a person summoned to appear before the Judicial Inquiry is not entitled to be represented by counsel. *Matter of Anonymous*, Abruzzo, J., U. S. District Court, Eastern District of New York; New York Law Journal, June 23, 1958, p. 1.

We paraphrase the quoted language to the case at bar: "The proceeding before the justice conducting the Judicial Inquiry was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities. It was a proceeding solely to elicit facts relating to the alleged misconduct of lawyers and others acting in concert with them. The duty of the justice conducting the Judicial Inquiry was merely to ascertain the facts relating to any misconduct of lawyers or of others acting in concert with them".

We submit that the analogy needs no further comment.

We quote further from the majority opinion in the *Groban* case solely because it is so apposite to the situation in the instant case:

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination."

The principal basis for appellants' contention that they were entitled to be represented by counsel while being examined as witnesses in the Inquiry, is that they faced imminent peril of prosecution for crime (Appellants' Brief, pp. 9, 18, 20). Such apprehensiveness or fear of the appel-

lants is predicated upon a statement by an assistant counsel for the Inquiry made to the appellants and in the presence of their attorney (as a "favor" and "off the record")—more than four months before the appellants refused to answer questions in the absence of counsel (R. 109-113, 115-116). What the appellants overlook is that they were repeatedly advised during the investigation that they were not being charged with anything; that they were not defendants, and that they were merely present as witnesses (R. 63, 65-67, 72, 78, 87, 93, 96, 98, 101). In this connection, we repeat solely for emphasis, that the function of the justice presiding at the Inquiry was confined to eliciting the facts and transmitting his findings and recommendations to the Appellate Division. No final adjudication could be made by the justice presiding at the Inquiry as to the responsibility of the appellants. Moreover, in the *Groban* case, the Fire Marshal was empowered to arrest "any person against whom there was sufficient evidence on which to base a charge of arson". The justice presiding at the Judicial Inquiry had no comparable power to arrest the appellants except for the unchallenged power to punish them for contempt for their refusal to answer the questions within the conceded scope of the Inquiry.

In view of this court's holding in the *Groban* case, and in the light of the procedures applicable to the Judicial Inquiry, the appellants' fear of "imminent peril" is indeed illusory.

(6)

***In any event, appellants were afforded full opportunity to confer with counsel.***

We make this final observation. Appellants argue as if they were denied, in an absolute sense, their asserted right to counsel. On the contrary, all that the appellants were denied was the physical presence of their counsel in the hearing room during interrogation. They were not

denied, at any stage—even as to why they should not be punished for contempt (R. 84)—the privilege to confer with and obtain the advice of their counsel, who was accessible to them by reason of being immediately outside the hearing room.\*

By way of illustration, we quote from the record:

"The Court [addressing counsel for appellants]: Your client wishes to say something to you, and he wants to speak, but you represent him, and I will hear you after you have consulted with him.

(Mr. Zangara and Mr. Percudani consulted in the rear of the courtroom.)

The Court: All right, Mr. Zangara, you have been talking with your client now.

Mr. Zangara: He has advised me that he does not wish to testify without the presence of an attorney representing him.

The Court: That has been ruled on by the Courts.

Mr. Zangara: I understand that. I told him to take the stand and to make that clear to your Honor (R. 65)

\* \* \*

The Court [addressing one of the appellants]: I don't want anything off the record. You may go out and consult counsel.

(The witness retired from the courtroom and later returned.)

\* \* \*

Q. Mr. Percudani [one of the appellants], you left the courtroom and conferred with your attorney.

The Court: You have conferred with your attorney?

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\* We do not deem it amiss to quote here from the report of Mr. Justice Arkwright filed with the Appellate Division (Appendix C annexed hereto). Mr. Justice Arkwright stated:—"We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights."

The Witness: Yes. Upon conferring with my attorney, sir, I will still have to state that without counsel being present I cannot answer any questions, sir." (R. 66-67)

. . .

The Court [addressing one of the appellants]: Well, you were informed here—your counsel was informed, and I so inform you again that that has been ruled upon by the Appellate Division, and that counsel at my direction may or may not be allowed in the room while a witness is being examined.

I have ruled here that in this case, and in all that have been before me that counsel will not be allowed in the room while a witness is being examined.

I am telling you that and you may be guided accordingly now. You have your counsel, so you take your advice from your counsel. I assume you have gone over it very carefully with him. He is outside.

The Witness: I haven't gone over it as carefully as I would have liked to.

The Court: If you wish to go out, I will suspend for a few minutes and let you go out.

The Witness: No, your Honor, because I understand that the United States Supreme Court has not ruled on it yet.

The Court: All right, go ahead, Mr. Hurley. You don't wish to go out then?

The Witness: No, sir" (R. 78).

. . .

The Court [addressing one of the appellants]: May I say, if you wish at any time to consult counsel, you are free to do so after the question is asked, or after I direct you, whichever you want to do (R. 98).

. . .

The Court [addressing one of the appellants and his counsel]: You understand you are not here as a defendant. You are merely here as a witness. We are going to ask him some of the questions that were



asked before and if he wishes to consult you, we will give him every opportunity to do so at any time during the questioning or any time that I direct" (R. 101).

Thus it affirmatively appears that at no time were appellants deprived of any constitutional right. On the contrary, the Additional Special Term was indulgent beyond the requirements of law in affording them every opportunity to seek and to obtain the advice of their attorney.

### CONCLUSION

**The appeal should be dismissed, certiorari denied, and the orders of the New York Court of Appeals affirmed, with costs.**

February 26, 1959.

Respectfully submitted,

DENIS M. HURLEY,  
*Attorney and Counsel for Appellee,*  
Office and Post Office Address,  
Borough Hall,  
Brooklyn 1, New York.

MICHAEL A. CASTALDI,  
MICHAEL CAPUTO,  
*of Counsel.*

## APPENDIX A

**Order of the Appellate Division Dated January 21, 1957  
 Authorizing a Judicial Inquiry and Investigation**

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1957.

## Present:

HON. GERALD NOLAN, *Presiding Justice*  
 " HENRY G. WENZEL, JR.,  
 " GEORGE J. BELDOCK,  
 " CHARLES E. MURPHY,  
 " HENRY L. UGHETTA, *Associate Justices.*

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IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS.

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A petition having been presented to this court by the Brooklyn Bar Association alleging that certain attorneys and counselors-at-law, and other persons acting in concert with them, are or may be or were or may have been engaged in illegal, corrupt or unethical practices, and in conduct prejudicial to the administration of justice, as set forth in said petition, and praying for a judicial inquiry with respect thereto;

*Appendix A—Order of the Appellate Division Dated  
January 21, 1957 Authorizing a Judicial Inquiry and  
Investigation*

NOW, THEREFORE, pursuant to the authority vested in this court by the State Constitution (Art. VI, Sec. 2) and by statute (Judiciary Law, Sections 90, 86), it is hereby:

ORDERED, that a judicial inquiry and investigation be and they hereby are directed to be made:

(1) With respect to the alleged improper practices and abuses by attorneys and counselors-at-law in Kings County, and by persons acting in concert with them, as alleged in said petition;

(2) With respect to alleged corrupt and unethical practices, including the practice of solicitation in obtaining retainers and in the subsequent prosecution and disposition of claims and actions;

(3) With respect to any other practice involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them; and

(4) With respect to any and all conduct prejudicial to the administration of Justice by attorneys and others acting in concert with them; and it is further

ORDERED, that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of ~~Kings~~, with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; and it is further

ORDERED, that, for the purpose of conducting said inquiry and investigation, an additional Special Term of the

*Appendix A—Order of the Appellate Division Dated  
January 21, 1957 Authorizing a Judicial Inquiry and  
Investigation*

Supreme Court, in and for the County of Kings, be and it hereby is appointed to be held, commencing January 22, 1957, at the Court House in Brooklyn, New York, and that Mr. Justice George A. Arkwright, be and he hereby is assigned to hold such Special Term; and it is further,

ORDERED, that Denis M. Hurley, Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation, pursuant to the provisions of the Judiciary Law (Section 90; subdivisions 6 and 7), it is further

ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations.

Enter:

GERALD NOLAN,  
Presiding Justice.

## APPENDIX B

### Section 90 of the Judiciary Law (Pertinent Provisions)

*§.90. Admission to and removal from practice by appellate division; character committees*

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law, shall admit him to practice as such attorney and counselor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

. . .

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

. . .

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the



*Appendix B—Section 90 of the Judiciary Law  
(Pertinent Provisions)*

charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counselor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counselor-at-law must be allowed to defend himself against such charges.

The presiding justice of the appellate division to which charges of professional misconduct against an attorney and counselor-at-law have been presented, may make an order directing the expenses of such proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including also in a county wholly within a city or in a county having a population of over one hundred sixty thousand inhabitants, the expense of a preliminary investigation in relation to such charges, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

7. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys

*Appendix B—Section 90 of the Judiciary Law  
(Pertinent Provisions)*

and counselors-at-law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counselor-at-law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

\* \* \*

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counselor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

## APPENDIX C

**Pertinent Excerpts from Report of Mr. Justice  
Arkwright Filed in the Appellate Division on  
June 11, 1958 and Published in the New York  
Law Journal of June 23, 1958**

### APPELLATE DIVISION

#### SECOND DEPARTMENT

#### REPORT OF SUPREME COURT JUSTICE ARKWRIGHT ON THE JUDICIAL INQUIRY AND INVESTIGATION BEING CONDUCTED AT ADDITIONAL SPECIAL TERM

Supreme Court Justice George A. Arkwright has submitted to the Appellate Division, Second Department, a preliminary report of the activities and accomplishments to date of the judicial inquiry and investigation being conducted by the Additional Special Term of the Supreme Court, Kings County. The full text of the report, which is dated June 11, 1958, and addressed to Presiding Justice Gerald Nolan, follows:

. . .

The magnitude of the task facing our staff can be observed from the fact that during the years 1953-1957, inclusive, 122,933 statements of retainer were filed for Kings County alone with the Appellate Division, mostly in negligence cases. It is significant to note that the number of these statements filed for Kings County increased each succeeding year as follows: 18,527 (1953); 20,535 (1954); 23,367 (1955); 26,667 (1956); 33,837 (1957). Percentage-wise, these figures show a huge increase of 82.5% from 1953 to 1957. Moreover, the increase during the year (1957) that the Judicial Inquiry commenced its operations over the previous year (1956) was 23%. In order to spot-check even a small sampling of this large backlog of cases, by calling only one or two witnesses and reviewing the file in each case, a tremendous task was involved.

. . .

*Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958*

Some idea of the breadth and scope of the investigation being conducted may be gleaned from the facts and figures that follow.

The conduct and practices of 28 attorneys have been thoroughly investigated to date. Under dates of December 11, 1957, January 29, 1958, March 26, 1958 and May 23, 1958, I submitted intermediate reports on 14 of these attorneys and I expect to submit to your Honorable Court on or before July 1st of this year reports dealing with the remaining 14 attorneys. In each instance, my report on an attorney sets forth the proceedings had, my findings of fact and my recommendations for action by the Appellate Division.

The Judicial Inquiry issued 4,875 request subpoenas to witnesses from March, 1957, to date. A total of 4,422 persons appeared at the Judicial Inquiry and signed the visitor's book.

Personal subpoenas and subpoenas duces tecum were served upon 2,150 persons and approximately 5,000 insurance company files were subpoenaed and reviewed. The files of other defendants, such as the City of New York and the Transit Authority, have also been examined. But most of the claims made and actions commenced are against defendants represented by casualty insurance companies.

The staff of the Judicial Inquiry has examined in private session about 2,500 witnesses between March, 1957, and the present date, taking statements under oath from 1,364 of these persons.

Since May 1, 1957, 726 witnesses were examined at length before me at the Additional Special Term.

We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.

*Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958*

As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts.

The financial records of attorneys, physicians, public adjusters, insurance adjusters, collision repairmen and many others have been audited by our accountants. At the present time, the books of numerous other persons are being audited. Some attorneys have refused to produce any of their financial records and have made application to the courts to quash the subpoenas served upon them.

We regret exceedingly to be compelled to state that a sordid picture of unethical, unlawful and sometimes criminal practices by certain attorneys and persons acting in concert with them has been developed. Unlawful patterns of solicitation of cases have involved collaboration between attorneys, doctors, auto body repairmen, insurance brokers and other persons. A great number of instances of collusion between attorneys and doctors to defraud insurance carriers by the issuance of forged or fraudulent and exaggerated medical certificates and medical bills have been uncovered. Similarly, a large number of cases involving false and exaggerated loss of earnings statements submitted to such carriers have been brought to light. Evidence has also been adduced with regard to widespread unlawful and unprofessional attempts to influence and to corrupt employees and others associated with insurance carriers in the processing of liability claims. The evidence in the investigation to date, encompassing approximately 3,000 negligence cases, establishes frauds totaling many millions of dollars upon these carriers and their policyholders.

. . .



*Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958*

Upwards of 60 attorneys have thus far represented and appeared as counsel for numerous witnesses called to testify at the Additional Special Term, many of them being distinguished members of the Bar. A number of these attorneys have appeared for different witnesses on different occasions.

Never in any prior similar investigation in New York State have so many witnesses been represented by so many and by such distinguished counsel. These attorneys have been most zealous in the protection of the rights of their clients and they have, as is their right, raised almost every conceivable legal and constitutional question. What is most disconcerting, however, is that while these witnesses—especially professional people, lawyers and doctors—are so well versed in their rights they seem to have no conception of their professional duties and civic responsibilities.

Some of the questions posed by counsel have involved a claimed right to have counsel present in the courtroom during the examination of a witness; the Judicial Inquiry's right to call non-attorneys as witnesses; the right of the Additional Special Term to grant a witness immunity from prosecution; the permissible scope of subpoenas duces tecum issued by the Judicial Inquiry within the constitutional privilege against unreasonable searches and seizures; the relevance of documents called for in these subpoenas duces tecum; whether all motions and applications arising from the Judicial Inquiry should be made in the first instance before the Additional Special Term; the jurisdiction of the Judicial Inquiry to investigate attorneys who, although practicing law, in the sense of trying cases in the courts of Kings County, neither reside nor maintain their offices in this County, as well as numerous other pertinent questions of law.

*Appendix C—Pertinent excerpts from Report of Mr. Justice Arkwright Filed in the Appellate Division on June 11, 1958 and Published in the New York Law Journal of June 23, 1958*

Applications for relief have been made in the Court of Appeals, in the Appellate Division, in the Additional Special Term, in Special Term, Part I (Supreme Court, Kings County), and in the United States District Court for the Eastern District of New York. The proceedings under Article 78 were all initiated in the Appellate Division and to the New York Court of Appeals. The two equity actions for injunctive relief were brought in the United States District Court for the Eastern District of New York, an attorney and a doctor claiming that they had been deprived of due process under the Fourteenth Amendment to the Constitution of the United States by Mr. Hurley and by me, named as the defendants.

. . .

It is next to impossible to state in succinct form the work and accomplishments of the Judicial Inquiry to date. Yet, it is self-evident from this short summary that the past year and a half has been an active and trying period for the Judicial Inquiry. We believe, despite all the legal delays, that it has also been a productive period. The revelations before the Additional Special Term of corruption in a certain segment of the Bar have been highly disturbing. However, it is our hope that the continuance of the much-needed task will make it possible for the legal profession to clean its own house of certain disreputable members, thereby serving not only the best interests of the legal profession but freeing the public, and all those who have been paying unjust tribute, from the depredations of that unscrupulous minority which confuses its lofty status at the Bar with unbridled license to defraud and to corrupt for personal gain.

## APPENDIX D

**Opinion in *Matter of M. Anonymous v. Arkwright*,  
5 App. Div. 2d 790, Leave to Appeal Denied in  
4 N. Y. 2d 676**

In the Matter of M. Anonymous, Petitioner against George A. Arkwright, as Justice of the Supreme Court of the State of New York, respondent. —By an order of this court dated January 21, 1957, as amended by subsequent order, dated February 11, 1957, a judicial inquiry and investigation was directed with respect to the improper practices and abuses by attorneys in Kings County and by persons acting in concert with them, as alleged in the petition of the Brooklyn Bar Association. In part, the order directed inquiry with respect to practices "involving professional misconduct, fraud, deceit, corruption, crime and misdemeanor, by attorneys and by others acting in concert with them" and with "respect to any and all conduct prejudicial to the administration of justice by attorneys and others acting in concert with them". The order appointed an additional Special Term of the Supreme Court to conduct the inquiry and investigation and provided that the inquiry and investigation shall be conducted by a named Justice of the Supreme Court, "with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records". An attorney nominated by the Brooklyn Bar Association was designated to aid the said Justice in the conduct of the inquiry and in the prosecution of said investigation. The order also provided that "for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry

*Appendix D—Opinion in Matter of M. Anonymous v. Arkwright, 5 App. Div. 2d 790, Leave to Appeal Denied in 4 N. Y. 2d 676*

and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court" and "that upon the conclusion of said inquiry and investigation the said Justice shall make and file with the court his report setting forth his proceedings, his findings and his recommendations." On or about July 19, 1957 petitioner submitted to this court his resignation as an attorney and counsellor-at-law, but no order has been entered upon his purported resignation. Pursuant to subpoena, petitioner attended at the additional Special Term, was sworn and refused to answer certain questions. By this proceeding pursuant to article 78 of the Civil Practice Act, petitioner seeks to review the order of the additional Special Term adjudging him guilty of contempt and fining him \$250. No issue is raised as to whether the review of the contempt order by an article 78 proceeding is proper. Determination unanimously confirmed, without costs. The fine provided for in the order is to be paid within 30 days from the entry of the order hereon. Petitioner challenges the power and jurisdiction of the Appellate Division to make the order, and the power and jurisdiction of the additional Special Term to conduct the investigation as to him, as he had resigned from the Bar. He did not refuse to answer on the ground that his answers might tend to incriminate him. He reserves the alleged constitutional rights to refuse to answer questions (N. Y. Const., art. I, §§ 6, 12; U. S. Const., 4th, 5th Amdts.) and based his refusal to answer on the ground that the additional Special Term excluded his attorney while he was being questioned. It was within the power and jurisdiction of this court to make the order directing the inquiry and investigation (N. Y. Const., art. VI, § 2; Judiciary Law, §§ 86, 90; *Matter of Bar Assn. of*



*Appendix D—Opinion in Matter of M. Anonymous v. Arkwright, 5 App. Div. 2d 790, Leave to Appeal Denied in 4 N. Y. 2d 676*

*City of N. Y.*, 222 App. Div. 580; *Matter of Brooklyn Bar Assn.*, 223 App. Div. 149; *People ex rel. Karlin v. Culkin*, 248 N. Y. 465), and petitioner was required to answer questions as to his conduct as an attorney, subject to his right to refuse to answer such questions if his answers would expose him to punishment for crime. In its discretion the additional Special Term might have permitted petitioner's attorney to be present while petitioner was being questioned, since it is clear that he was not merely a witness as to improper conduct of others but was himself a subject of the inquiry as to his own alleged acts of professional misconduct. But the result of the inquiry and investigation as to petitioner would be merely a report and a recommendation as to future action, and would not be a final determination as to him. It was not an abuse of discretion for the additional Special Term to exclude petitioner's attorney from the room while petitioner was being questioned, nor was it a violation of his constitutional rights (*People ex rel. McDonald v. Keeler*, 99 N. Y. 463; *Matter of Groban*, 352 U. S. 330; Judiciary Law, § 90). Section 73 of the Civil Rights Law is not applicable to this inquiry and investigation. Since petitioner based his refusal to answer on invalid grounds, he was properly found guilty of contempt (*People v. Berson*, 308 N. Y. 918). A person is not absolved of willful wrongdoing because he relied on his attorney's advice (*People v. Marcus*, 261 N. Y. 268), or on his own belief as to the law. Here the intent to defy the dignity and authority of the court on invalid grounds is clear (see, e.g., *Matter of Berkon v. Mahoney*, 268 App. Div. 825, *affd.* 294 N. Y. 828; *People v. Berson*, *supra*). The papers and records shall be sealed and deemed private and confidential, and no one shall have access to them without further order of this court or of the additional Special Term. Present—Wenzel, Acting P. J., Beldock, Murphy, Ughetta, and Kleinfeld, JJ.



## APPENDIX E

### Section 73 of the New York State Civil Rights Law (Pertinent Provisions)

#### § 73. Code of fair procedure for investigating agencies

1. As used in this section the following terms shall mean and include:

(a) "Agency". A standing or select committee of either house of the legislature or a joint committee of both houses; a duly authorized subcommittee of any such legislative committee; the commissioner of investigation acting pursuant to section eleven of the executive law; a commissioner appointed by the governor acting pursuant to section six of the executive law; the attorney general acting pursuant to subdivision eight of section sixty-three of the executive law; and any temporary state commission or any duly authorized subcommittee thereof which has the power to require testimony or the production of evidence by subpoena or other compulsory process in an investigation being conducted by it.

(b) "Hearing". Any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing". Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing". Any hearing other than a public hearing.

2. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally

*Appendix E—Section 73 of the New York State Civil Rights Law (Pertinent Provisions)*

served upon him prior to the time when he is required to appear, a copy of this section, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summoned.

3. A witness summoned to a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

## APPENDIX F

**Proposed Legislation to Amend the New York State  
Civil Rights Law, Which Failed of Passage**

## STATE OF NEW YORK

No. 3347 Int. 3210

IN ASSEMBLY

February 11, 1958

Introduced by MR. AUSTIN—read once and referred to  
the Committee on Judiciary

## AN ACT

TO AMEND THE CIVIL RIGHTS LAW, IN RELATION TO THE RIGHT  
OF REPRESENTATION BY COUNSEL OF PERSONS CALLED AS  
WITNESSES IN CERTAIN INQUIRIES AND INVESTIGATIONS

The People of the State of New York, represented in Senate  
and Assembly, do enact as follows:

Section 1. The civil rights law is hereby amended by  
inserting therein a new section, to be section twelve-a, to  
read as follows:

*§ 12-a. Right of representation by counsel of persons  
called as witnesses in certain inquiries and investigations.  
Any person called as a witness by or before any legislative,  
executive or judicial investigating committee, commission  
or other agency, or by or before any judge, arbitrator,  
referee or other person heretofore or hereafter authorized  
or directed to conduct any inquiry or investigation, whose  
testimony may tend to involve himself or any other person  
in any subsequent criminal or quasi-criminal prosecution  
or in any subsequent disciplinary proceeding for profes-*

**Appendix F—Proposed Legislation to Amend the New York State Civil Rights Law, Which Failed of Passage**

sional misconduct, or whose testimony may subject himself or any other person to any forfeiture, fine, penalty, or the revocation or suspension of any license to engage in a profession, trade or business, shall have the right to be accompanied by his counsel who shall be entitled on behalf of his client to (a) object to the jurisdiction of the committee, commission, agency, judge, arbitrator, referee or other person conducting such inquiry or investigation and to argue briefly thereon; (b) to confer privately with his client to advise him of his legal rights whenever his client requests such a conference; (c) to object to procedures deemed by him to violate his client's legal rights; and (d) question the witness on his behalf, at the conclusion of his direct testimony, on any matter relevant to the subject of the inquiry or investigation, subject to such reasonable limitations as may be imposed by the officer presiding at such inquiry or investigation.

§2. This act shall take effect immediately.

Explanation—Matter in *italics* is new; matter in brackets [] is old law to be omitted.